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In the Supreme Court of the United States

OCTOBER TERM, 1984

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether a federal prisoner may bring an action in federal district court to enjoin his warden from complying with a request by a state prosecutor for temporary custody of the prisoner pursuant to the Interstate Agreement on Detainers (IAD) on the ground that the indictment allegedly is invalid because of prior violations of the IAD by the requesting state, or whether the prisoner instead must challenge the validity of the indictment in the court of the requesting state that has jurisdiction of the indictment.

2. Whether under the "anti-shuttling" provisions of the IAD, a state that has received custody of a prisoner pursuant to the IAD must retain him in its custody while it appeals the granting of the prisoner's motion to dismiss the charges against him or suffer a forfeiture of the right to prosecute him.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Superintendent of the Federal Prison Camp at Boron, California (see note 1, *infra*), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 743 F.2d 693. The March 7, 1983 order of the district court (App., *infra*, 22a-24a) is unreported.

The various orders of the Arizona courts in the related criminal prosecution (App., *infra*, 25a-40a) are unreported, except for the opinion of the Arizona Court of Appeals reversing the dismissal of the indictment on

state law grounds (App., *infra*, 27a-32a), which is reported at 134 Ariz. 251, 655 P.2d 371.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1984, and a petition for rehearing was denied on January 4, 1985 (App., *infra*, 21a). By order dated March 27, 1985, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including May 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Articles III, IV and V of the Interstate Agreement on Detainers, 18 U.S.C. App. 2, at 545-547, are reproduced at App., *infra*, 41a-44a.

STATEMENT

Respondent brought this action against the Warden of the Federal Correctional Institution (FCI) in Pleasanton, California, where he was then incarcerated, to prevent the warden from complying with a request by the State of Arizona under the Interstate Agreement on Detainers (IAD) for temporary custody of respondent to try him on fraud charges pending in that State.[1]

1. a. Respondent was indicted by a grand jury in Arizona on May 15, 1979, on various counts of fraud (E.R. 134).[2] He was a fugitive from justice at the time

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[1] We have been informed by the Bureau of Prisons that in June 1984 respondent was transferred to the Federal Prison Camp at Boron, California. Although the district court's injunction barring the transfer of respondent to Arizona authorities by its terms is directed to the Warden of the Pleasanton FCI, we understand it to bind any other federal official who succeeds to the custody of respondent. We therefore have substituted the Superintendent of the Boron Prison Camp for the Warden of the Pleasanton FCI as the petitioner in this case.

[2] "E.R." refers to the Excerpts of Record filed in the court of appeals.

(*ibid.*). Respondent subsequently was arrested in Idaho and was convicted in the United States District Court for the District of Idaho of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced there on September 8, 1980, to a five-year term of imprisonment (E.R. 134, 153). Following sentencing in federal court, respondent was transferred among several federal institutions and ultimately was incarcerated at the FCI in Englewood, Colorado, on October 28, 1980 (E.R. 169).[3] Arizona had lodged a detainer against respondent and a request for custody at the time he was being held awaiting trial in the United States District Court in Idaho, although that request was not processed while he was in pretrial detention (E.R. 147, 149). After his conviction, respondent sent a letter to the Office of the Attorney General of Arizona requesting that he be tried on the state fraud charges (E.R. 153-155). That letter was received by the Attorney General's office in Arizona on November 23, 1980 (App., *infra*, 7a, 22a).

After some delay occasioned by respondent's refusal to sign the forms necessary to effectuate his transfer (E.R. 150, 164), the warden of the Englewood FCI released respondent on February 11, 1981, to the temporary custody of Arizona officials for purposes of trial on the state fraud charges. Respondent was arraigned in Maricopa County Superior Court on February 20, 1981. There were several postponements of proceedings in the prosecution (E.R. 143), including a 32-day continuance of the deadline for filing pretrial motions that had been requested by respondent. On May 21, 1981, the date set for trial, respondent moved to dismiss the indictment on state-law speedy trial grounds under Ariz. R. Crim. P.

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[3] Respondent previously had been convicted in the United States District Court for the District of Arizona on December 14, 1978, of embezzlement from a bankrupt estate and interstate transportation of stolen securities, in violation of 18 U.S.C. 153 and 2314. He was sentenced to a term of 7½ years' imprisonment on that conviction (E.R. 153).

8.3(a), which, he argued, required that he be brought to trial within 90 days of his delivery into the temporary custody of Arizona. The Superior Court granted that motion and dismissed the indictment with prejudice (App., *infra*, 25a). In accordance with respondent's wishes, the Superior Court further ordered that respondent "be released by the Sheriff of Maricopa County into the custody of the United States Marshall [*sic*]" (*id.* at 26a).[4] Arizona authorities returned respondent to federal custody on May 29, 1981, and the Arizona detainer lodged against him at the FCI in Englewood was withdrawn on June 6, 1981. App., *infra*, 8a-9a, 23a; E.R. 186-187.

b. The State appealed the Superior Court's dismissal of the indictment, and on October 7, 1982, the Arizona Court of Appeals reversed and remanded the case for trial (App., *infra*, 27a-32a). The Court of Appeals held that the 32-day delay requested by respondent should have been excluded in computing the 90-day speedy trial period under state law (*id.* at 30a-32a).

2. a. Following reinstatement of the Arizona charges, Arizona lodged a new detainer against respondent, and the Maricopa County Superior Court transmitted a request for custody of respondent, in the form of a writ of habeas corpus ad prosequendum, to the warden of the FCI at Pleasanton, California, where respondent was then incarcerated (E.R. 47-49; see also *id.* at 21-22). On January 3, 1983, respondent filed a motion in the Superior Court to quash the writ and to dismiss the state indictment under provisions of the IAD (Articles III(d) and IV(e)) specifying that if trial is not had on any

[4] On May 6, 1981, prior to dismissal of the indictment, respondent had filed a motion in Superior Court for an order directing the Maricopa County Sheriff to release him to the custody of the United States Bureau of Prisons in Arizona, pending disposition of the state charges. Respondent sought this relief so that he could receive surgery for a double hernia, coordinate his enrollment in college courses, have better access to legal materials, and generally be in more favorable surroundings (E.R. 91-95).

indictment prior to return of the prisoner to the sending state, the indictment "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." Respondent's contention was that these so-called "anti-shuttling" provisions of the IAD required dismissal of the indictment because he had been returned to federal custody in May 1981, after the indictment was dismissed on state-law speedy trial grounds. By order dated January 12, 1983, the Superior Court denied respondent's motion to quash the writ and dismiss the indictment, reasoning that respondent in 1981 had "invited his return to federal custody by filing the motion to dismiss which has been determined by the appellate court to be erroneously granted" (App., *infra*, 33a). On February 16, 1983, the Supreme Court of Arizona declined to accept jurisdiction of a petition for special action filed by respondent challenging under Article III(d) of the IAD the right of the Superior Court to proceed with the case (App., *infra*, 36a).

b. On January 21, 1983—after the Superior Court denied respondent's motion to dismiss under the IAD's anti-shuttling provision but before the Arizona Supreme Court refused review—respondent filed a second motion in Superior Court to dismiss the indictment. In this motion, respondent contended that the State had not brought him to trial within 180 days of the date in 1980 on which the Office of the Attorney General of Arizona received his request for disposition of the charges, as required by Article III(a) of the IAD (E.R. 121-124). By order dated January 31, 1983, the court denied this motion to dismiss as well (App., *infra*, 34a-35a).[5] Respondent filed a motion in Superior Court for reconsideration of that order on February 4, 1983 (E.R. 173-177).

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[5] Under Art. V(c) of the IAD, if an indictment on the basis of which a detainer is lodged has not been brought to trial within the 180 days permitted under Art. III(a), the court where the indictment has been pending "shall enter an order dismissing the same with prejudice * * *."

3. Meanwhile, on January 18, 1983, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California under 28 U.S.C. 2241. He sought an order preventing the warden of the Pleasanton FCI from complying with Arizona's request for custody and directing dismissal of the Arizona charges with prejudice, on the ground that Arizona had violated Articles III(a) and III(d) of the IAD by not bringing him to trial within 180 days of receipt of respondent's request for disposition of the charges in November 1980 and by returning him to federal custody after the indictment was dismissed in May 1981 (E.R. 1-3). On February 1, 1983, respondent filed an amended complaint seeking declaratory and injunctive relief as well as habeas corpus (E.R. 4-7).

In a brief order dated March 7, 1983, the district court held the Arizona indictment invalid because respondent had not been tried on the state fraud charges before he was returned to federal custody in May 1981 (App., *infra*, 22a-24a).[6] The court therefore entered a permanent injunction prohibiting the federal warden from recognizing or giving effect to the detainer based on that indictment and from transferring respondent to the custody of Arizona (*id.* at 24a).

4. After the federal district court granted relief under the IAD's anti-shuttling provision, the Maricopa County Superior Court, on March 24, 1983, granted respondent's still-pending motion for reconsideration of its January 31, 1983 order declining to dismiss the indictment under the IAD's 180-day speedy trial provision. The Superior Court, without explanation for its change of view, dismissed the indictment and accordingly vacated the date that had been set for trial, which was March 28, 1983, only four days later (App., *infra*, 37a-

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[6] The district court did not reach respondent's alternative IAD speedy trial contention.

38a). The State of Arizona has appealed this order to the Arizona Court of Appeals, while respondent has appealed the earlier order denying his motion to dismiss the indictment under the anti-shuttling provision. Those appeals are still pending before the Arizona Court of Appeals (App., *infra*, 39a-40a).

5. On September 25, 1984, the Ninth Circuit affirmed the judgment and permanent injunction entered by the federal district court in the instant proceedings (App., *infra*, 1a-20a).

a. The court of appeals first rejected the contention that the district court should have declined to entertain respondent's IAD-based challenges to the Arizona indictment and instead left respondent to his remedies in the Arizona courts (App., *infra*, 12a-16a). The court acknowledged that "[e]ven though the district court directed its order to the Warden, a federal official, that court effectively held up the State of Arizona's attempt to prosecute [respondent]" (*id.* at 13a). And the court further acknowledged that under this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny, a federal court ordinarily should not intervene in pending state criminal proceedings, because the defendant can secure a full and fair day in court on his federal claims by raising them as a defense to the prosecution (App., *infra*, 13a-14a). But the court concluded that, under the IAD, "the usual notions about comity do not obtain" (*id.* at 15a). The court gave three reasons for this conclusion.

First, the court stated that the *Younger* doctrine is inapposite because the IAD is a "supervening law" that constitutes a "treaty between two separate and independent sovereigns" (App., *infra*, 14a-15a). In the court's view, "[t]he United States has as much right as Arizona to police the IAD and to wrestle in the first instance with substantial federal questions arising from

it," and respondent therefore was entitled to "ask[] a federal court to decide whether the United States would violate its treaty with Arizona if the Warden retransferred [respondent] to Arizona" (*id.* at 15a).

Second, the court relied on Article V(g) of the IAD, which provides that for all purposes other than that for which temporary custody is exercised under the IAD, "the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State * * *." The court believed that under this provision, the sending state—in this case, the United States—retains jurisdiction over the prisoner for all purposes other than the receiving state's disposition of outstanding charges, and that Article V(g) therefore vests the federal courts with jurisdiction to relieve respondent (a federal prisoner) of the burden of being transferred to Arizona in violation of the IAD (App., *infra*, 15a-16a).

Third, the court reasoned that as long as respondent remains a federal prisoner in federal custody, only the federal authorities can send him to Arizona again, and an injunction preventing respondent's transfer to Arizona therefore must be directed to the federal warden. The court of appeals concluded that the exercise of federal jurisdiction was appropriate here because only a federal court can issue such an injunction against a federal official (App., *infra*, 16a).

b. On the merits, the court of appeals, while rejecting respondent's speedy trial claim (App., *infra*, 18a), concluded that the anti-shuttling prohibition in Article III(d) prevents Arizona from trying respondent because Arizona returned him to federal custody in 1981 without trying him on those charges (App., *infra*, 16a-19a). The court recognized that respondent was returned to federal custody only because the indictment had been dismissed by the state court. But the court held that "[t]he reason *why* Arizona failed to put [respondent] on trial is of no moment" (App., *infra*, 19a (emphasis in

original)), because "Article III(d) gives the receiving state one opportunity to try a prisoner in its temporary custody" (*id.* at 18a).

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that the district court could entertain this injunctive action to prevent the federal warden from complying with Arizona's request for temporary custody of respondent is flatly inconsistent with the text and purposes of the Interstate Agreement on Detainers. Article IV(a) of the IAD imposes a mandatory duty on the warden to make a prisoner available to the receiving state, and the courts of the sending state (in this case, the United States) have no authority to prevent the warden from performing that duty. Once the prisoner is delivered into the custody of the receiving state, he may raise in the pending criminal prosecution his claim that the indictment is of no force and effect because of a prior violation of the IAD by the receiving state, and he may move to dismiss the indictment on that ground. By contrast, the court of appeals' view that the prisoner can litigate the very same issues in the courts of the sending state prior to his transfer inevitably would complicate and delay the transfer process, and thus frustrate the central purposes of the IAD of "provid[ing] States with a simple and efficient means of obtaining prisoners from other States" and facilitating "cooperative procedures among States" for the expeditious disposition of outstanding charges. *United States* v. *Mauro*, 436 U.S. 340, 356 n.23, 351 (1978).

The court of appeals' holding on the merits—that Arizona now is barred by the IAD's anti-shuttling provisions from prosecuting respondent because it returned him to federal custody in 1981 without trying him—also is directly contrary to the text and purposes of the IAD. Respondent was returned to federal custody in 1981 be-

cause the charges against him were dismissed on state law grounds. The IAD's anti-shuttling provisions apply only where the charges are still pending against the prisoner, not where they have been dismissed. Moreover, to retain the prisoner in pretrial custody in the receiving state for an extended period pending the prosecution's appeal of the dismissal of the indictment is inconsistent with the purpose of the IAD to minimize the disruption of the prisoner's sentence in the sending state.

The court of appeals' decision on these issues conflicts with the decisions of federal and state courts alike and threatens substantially to disrupt the efficient and cooperative implementation of the IAD. Review by this Court therefore is warranted.

1. a. The text and background of the IAD refute the court of appeals' conclusion that the district court in this case, as the court of the sending state, could enter an injunction barring the warden from complying with Arizona's request for temporary custody of respondent to try him on the pending indictment. Article IV(a) provides that the appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending "*shall be entitled* to have a prisoner against whom he has lodged a detainer * * * made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated" (emphasis added). Article IV(a) imposes only two conditions on the receiving state's entitlement: first, "[t]hat the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request"; and second, "[t]hat there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the re-

quest for temporary custody or availability, either upon his own motion or upon motion of the prisoner."

Both of these conditions have been met here. The Maricopa County Superior Court, which was the court having jurisdiction of the indictment, approved and transmitted the request for custody in the form of a writ of habeas corpus ad prosequendum, and the 30-day period during which Arizona's request could be disapproved by the Attorney General (the "Governor" for purposes of the IAD when the United States is the sending State[7]) has long since expired. Because the only two conditions set forth in Article IV(a) were satisfied, Arizona was, by its explicit terms, "entitled" to have respondent made available.[8]

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[7] See Interstate Agreement on Detainers Act, 18 U.S.C. App. 3, at 547. The Attorney General's authority under the IAD has been delegated to the Director of the Bureau of Prisons. 28 C.F.R. 0.94(n) and 0.96a. Because the Director did not disapprove Arizona's request for custody, this case does not present the question whether the governor of the sending state may disapprove a request because of his own view that prosecution of the prisoner by the requesting state would violate the IAD. Cf. *Michigan* v. *Doran*, 439 U.S. 282, 288 (1978).

[8] Because neither the courts below nor respondent has suggested that the two prerequisites to delivery imposed by the IAD itself were not satisfied here, there is no occasion to consider here whether a federal court could issue an injunction to prevent a federal warden from transferring a prisoner where these conditions have not been met. Compare *Cuyler* v. *Adams*, 449 U.S. 433 (1981).

In this petition, we analyze the question of Arizona's right to have respondent made available from the date on which the district court entered its injunction, because at that time the Superior Court had denied respondent's motion to dismiss the indictment and the indictment therefore was still pending. Although the Superior Court thereafter dismissed the indictment under the speedy trial provision of the IAD, that dismissal has been appealed by the State, and the appeal is still pending before the Arizona Court of Appeals. This case therefore is not moot, because if the Arizona Court of Appeals reverses the dismissal of the indictment

This conclusion is reinforced by Article V(a) of the IAD. Article V(a) provides that in response to a request for custody, "the appropriate authority in a sending State *shall offer to deliver temporary custody of such prisoner* to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had" (emphasis added). The emphasized passage makes clear that where, as here, the governor of the sending state has not disapproved the request for custody, the warden in the sending state has a mandatory duty to comply with the request for custody of the prisoner. This is even clearer when it is recalled that the request for custody must be approved and transmitted by the court that has jurisdiction of the pending indictment; it cannot be assumed that Congress and the party states intended to permit the warden to disregard a judicially approved request in the manner apparently contemplated by the court of appeals.

There likewise is no basis under the IAD for a *court* in the sending state to prevent the warden in that state from complying with his mandatory duty, since to do so would place it in conflict with the court in the receiving state that formally approved and transmitted the request. Moreover, for a court in the sending state to entertain protracted litigation concerning the validity under the IAD of the charges on which the request for custody is based would be inconsistent with the explicit statutory purpose set forth in Article V(a) of enabling the receiving state to obtain a "speedy and efficient prosecution."

Nor is there any special exception to the requirement that the prisoner be made available simply because the prisoner is in federal custody and the United States therefore is the sending state. Article V(a) provides

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and remands the case for trial, the injunction affirmed by the court of appeals in this case would bar petitioner from making respondent available to Arizona.

that "[i]n the case of a Federal prisoner, the appropriate authority in the receiving state *shall be entitled* to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial" (emphasis added), whichever the federal custodian determines is appropriate. Because the warden did not choose to make respondent available for trial in Arizona while retaining him in federal custody, Arizona was, under the sentence of Article V(a) just quoted, "entitled" to temporary custody of respondent pursuant to the IAD.

This interpretation of the IAD as imposing a duty to make the prisoner available where the two express conditions are satisfied also is supported by the legislative history of the Interstate Agreement on Detainers Act (see note 7, *supra*), in which Congress made the United States a party to the IAD. The Committee Reports state: "Unless the request is disapproved by the Governor of the State having custody within 30 days, temporary custody is given to the prosecutor for the purpose of transferring the prisoner and holding trial." S. Rep. 91-1356, 91st Cong., 2d Sess. 3 (1970); H.R. Rep. 91-1018, 91st Cong., 2d Sess. 3 (1970). Accord, 116 Cong. Rec. 13999 (1970) (remarks of Rep. Kastenmeier). There is no intimation that other restraints may be imposed by the sending state. See also *id.* at 14000 (remarks of Rep. Poff) (function of IAD is to "*insure* that both prosecution and defendant may, if they desire, obtain their day in court on a prompt and timely basis" (emphasis added)); *id.* at 38840 (remarks of Sen. Hruska) (same).

b. The fact that the warden in the sending state has a mandatory duty to make the prisoner available to the receiving state upon request does not mean that the prisoner thereby loses his right to contest the validity of the indictment under the IAD. It simply means that the prisoner must raise any IAD-based objection to the validity of the indictment in the usual manner—*i.e.*, by filing a motion to dismiss the indictment in the court

of the receiving state that has jurisdiction of the indictment. The prisoner's IAD defense then can be considered by that court, together with all other defenses and claims. Where, as here, a defendant has a fully adequate legal remedy in the criminal prosecution itself, principles of comity and federalism, as well as considerations prohibiting a court of equity from interfering with a pending criminal prosecution, ordinarily bar a federal district court from granting injunctive relief that would frustrate pending state proceedings in the manner the court of appeals in this case has permitted. Cf. *Younger* v. *Harris*, 401 U.S. 37 (1971).

The text of the IAD confirms that Congress and the other party states adhered to these established principles in the IAD. As we have explained, under Article IV(a) it is the court in the receiving state having jurisdiction over the pending indictment that must approve and transmit to the warden in the sending state the request for custody of the prisoner. It would be odd indeed for the framers of the IAD to have given the courts of the sending state jurisdiction to second-guess or frustrate a request that has been endorsed in this manner by the courts of a sister state. Compare *Michigan* v. *Doran*, 439 U.S. 282, 290 (1978). Moreover, the anti-shuttling provisions in Articles III(d) and IV(e) both provide that if trial is not had on a pending indictment prior to the return of the prisoner to his original place of imprisonment, the indictment shall not be of any further force and effect "and the court shall enter an order dismissing the same with prejudice." Similarly, Article V(c) provides that if the pending charges are not brought to trial within the time limits prescribed by Articles III(a) or IV(c), "the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect." In all of these sections, the IAD

provides for a judicial remedy only in the courts of the receiving state.[9] The explicit provision for a particular remedy in a particular court indicates that other, duplicative remedies in other courts (in the sending state) were not intended.

Nor is the IAD silent with regard to the availability of remedies in the sending state. Article IV(a) provides that there shall be a period of 30 days during which the governor of the sending state may disapprove the request for custody, either upon his own motion or that of the prisoner. See *Cuyler* v. *Adams*, 449 U.S. 433, 444, 446 n.13 (1981). This express provision for the prisoner to submit his objections to the *executive* branch in the sending state strongly reinforces the conclusion that the IAD does not provide a roving commission for general enforcement of its provisions by the *judicial* branch in that state.

Finally, Article IV(d) provides that nothing in Article IV "shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof * * *." In *Cuyler* v. *Adams*, *supra*, this Court held that this provision preserves preexisting procedural protections *outside* of the IAD, such as the right conferred by the Uniform Criminal Extradition Act (in those states that have adopted it) to a limited pretransfer judicial "hearing." 449 U.S. at 443-450. But *Cuyler* contains no suggestion that the IAD itself confers a right to a judicial hearing to contest the legality of a transfer; to the contrary, the Court indicated that the only means under the IAD by

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[9] See also Art. VI(a) (in computing time periods for purposes of IAD speedy trial provisions, "the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, *as determined by the court having jurisdiction of the matter*" (emphasis added)); Arts. III(a) and (b) (providing for transmission of a prisoner's request for disposition of charges underlying a detainer to the court of the prosecuting officer's jurisdiction); Arts. III(d) and IV(b) (where other detainers are pending, warden in sending state must inform other courts in receiving state of a request for disposition of charges).

which a prisoner could raise an objection in the sending state is by petitioning its governor for relief. 449 U.S. at 444-447.

A federal prisoner has no preexisting right outside of the IAD to a hearing to contest his transfer to the custody of a state for trial on pending charges.[10] This Court held in *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922), that the authority to cooperate with state law enforcement in this manner is within the inherent power of the Attorney General as custodian of federal prisoners, and prior to adoption of IAD it was the "[a]lmost invariabl[e]" practice of the Bureau of Prisons to grant a request by a state to make a federal prisoner available for purposes of trying him on state charges. See *Smith* v. *Hooey*, 393 U.S. 374, 381 n.13 (1969). There is no indication that Congress intended to disrupt this settled practice when it made the United States a party to the IAD. Cf. *Olim* v. *Wakinekona*, 461 U.S. 238 (1983); *Howe* v. *Smith*, 452 U.S. 473 (1981).

c. The relationship between the IAD and the extradition process reinforces the conclusion that a court in the sending state cannot grant relief in circumstances such as those presented here. The report of the Council of State Governments, which proposed the IAD in 1956,[11] observed that, at that time, the only way in which a prosecutor in one state could obtain custody of a prisoner in another state for purposes of bringing him to trial on pending charges was by means of extradition or waiver thereof by the prisoner. The provision in Article IV(a) of the IAD for the governor of the sending state

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[10] Congress has not applied the Uniform Criminal Extradition Act to persons in federal custody, presumably because no question of extradition arises in the context of a sovereign having nationwide jurisdiction. See, *e.g.*, *Thomas* v. *Levi*, 422 F. Supp. 1027, 1033 (E.D. Pa. 1976); *McCallum* v. *State*, 407 So.2d 865, 869-870 (Ala. App. 1981).

[11] See *Cuyler* v. *Adams*, 449 U.S. at 447-448; *United States* v. *Mauro*, 436 U.S. at 350-351.

to disapprove a request for custody was intended to preserve to the governor whatever discretion existed in the extradition context to decline to arrest and deliver up an individual. See Council of State Governments, *Suggested State Legislation, Program for 1957*, at 78-79 (1956). Cf. *Michigan* v. *Doran*, 439 U.S. at 288, citing *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66, 107 (1860).

This Court has made clear that where the governor of the asylum state has granted extradition, a court considering release of the individual on habeas corpus "can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive." *Michigan* v. *Doran*, 439 U.S. at 289. Thus, a court in the asylum state may not inquire into whether prison conditions in the demanding state violate the Eighth Amendment (*Pacileo* v. *Walker*, 449 U.S. 86 (1980)) or whether the judicially approved charges in the demanding state are supported by probable cause (*Michigan* v. *Doran*, *supra*). These limitations are in accordance with the recognition that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding" (*Michigan* v. *Doran*, 439 U.S. at 288). Nor may a federal court in the asylum state entertain a habeas corpus action challenging extradition on the basis of prison conditions in the demanding state. *Sweeney* v. *Woodall*, 344 U.S. 86 (1952). So too, it would seem clear that neither a federal court nor a state court in an asylum state may interfere in the extradition process by entertaining a challenge to extradition on the ground that the indictment in the demanding state is subject to dismissal—*e.g.*, on the basis of a double jeopardy or speedy trial violation or a prior violation of the IAD. See *Pearce* v. *Texas*, 155 U.S. 311,

313-314 (1894); *Munsey* v. *Clough*, 196 U.S. 364, 372-373 (1905).

A transfer of custody under the IAD also is a "summary and mandatory executive proceeding" (*Michigan* v. *Doran*, 439 U.S. at 288), and there is no indication that the framers of the IAD or Congress anticipated any more searching inquiry by the courts of the sending state when the prosecuting state seeks to obtain custody of the prisoner under the IAD rather than by extradition. To the contrary, the Court held in *Cuyler* v. *Adams*, *supra*, that the IAD merely preserves whatever judicial remedies the prisoner might have in the extradition setting. See 449 U.S. at 449 n.15. Accordingly, the IAD cannot be construed to permit a prisoner to challenge a request for his custody on the basis of an alleged defect in the indictment on which the request is based. In other words, under the IAD, as under the Extradition Clause and its implementing statutes, it was "never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial," since a transfer under the IAD, like extradition, " 'is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt.' " *Michigan* v. *Doran*, 439 U.S. at 288, quoting *In re Strauss*, 197 U.S. 324, 332-333 (1900).

d. The court of appeals acknowledged the teaching of *Younger* v. *Harris*, *supra*, that interference with a state criminal prosecution through the sort of injunctive action involved here would ordinarily be inappropriate (App., *infra*, 12a-14a). But the court of appeals believed that "the usual notions about comity do not obtain" under the IAD, and that it therefore is appropriate for the federal courts to "police" compliance with the IAD (*id.* at 15a). It is difficult to imagine a statement more at odds with the purposes of the IAD. As this Court recognized in *United States* v. *Mauro*, 436 U.S. at 351, Article I of the IAD states that one of its principal pur-

poses is to institute "cooperative procedures" to bring about the "expeditious and orderly disposition" of pending charges, and the substantive Articles that follow are designed to accomplish that end.

The court of appeals also seemed to believe that intervention by the federal courts was appropriate in order to decide whether the United States would "violate" its IAD "treaty" with Arizona if the warden retransferred respondent to Arizona (App., *infra*, 15a). Even if the court of appeals were correct that Arizona would violate the anti-shuttling provision of the IAD if it tried respondent (but see pages 22-29, *infra*), this does not mean that the United States would violate the IAD if it made the antecedent transfer of respondent to the custody of Arizona. Indeed, contrary to the court of appeals' view, the warden would violate the IAD if he did *not* make respondent available for trial in Arizona, because, as we have shown above, unless the governor of the sending state disapproves the request, the warden has a mandatory duty to comply.[12]

e. The court of appeals' holding that a prisoner can bring an action in the courts of the sending state to prevent the warden from complying with a request for temporary custody, and thereby litigate claims that the indictment is invalid under the IAD, squarely conflicts

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[12] The court of appeals also relied (App., *infra* 15a-16a) upon Art. V(g) of the IAD, which provides that the sending state shall retain jurisdiction over the prisoner for all purposes "other than that for which temporary custody as provided in [the IAD] is exercised * * *." However, this provision undermines rather than supports the court's holding. Art. V(g) by its terms concerns jurisdiction over the person of the prisoner; it does not address matters of judicial jurisdiction over cases. In particular, Art. V(g) does not suggest that the courts of the sending state have jurisdiction to adjudicate whether prosecution of the prisoner by another state would be consistent with the IAD. To the contrary, such a prosecution is precisely the purpose for which the requesting state exercises temporary custody under the IAD; consequently Art. V(g) itself suggests that litigation of issues relating to that prosecution is outside the jurisdiction of the sending state.

with the contrary conclusion by the Tenth Circuit that a federal prisoner's remedy in these circumstances is in the state court in which the criminal charges are pending. *Campbell* v. *Virginia*, 453 F.2d 1230, 1231 (1972). Accord, *Baity* v. *Ciccone*, 379 F. Supp. 552, 559-561 (W.D. Mo. 1974), appeal dismissed, 507 F.2d 717 (8th Cir. 1975). The Third Circuit likewise has held that the IAD vests the courts of the receiving state, to the exclusion of those in the sending state, with jurisdiction to entertain a challenge to a conviction on the ground that the receiving state did not bring a prisoner to trial within the time limits prescribed by the IAD. *Mokone* v. *Fenton*, 710 F.2d 998, 1002-1003 (3d Cir. 1983). Cf. *Grant* v. *Hogan*, 505 F.2d 1220 (3d Cir. 1974); *United States ex rel. Jennings* v. *Pennsylvania*, 429 F.2d 522 (3d Cir. 1970). A number of state courts likewise have held that only the courts of the state in which the criminal charges are pending have jurisdiction to entertain a challenge to the validity of those charges under the IAD, and that a court in the state in which the defendant is in custody cannot entertain an action to prevent his delivery on the basis of the alleged IAD violation. See *State* v. *West*, 79 N.J. Super. 379, 191 A.2d 758 (1963); *State ex rel. Chamberlain* v. *Martinco*, 288 Minn. 231, 179 N.W.2d 286 (1970); *State ex rel. Garner* v. *Gray*, 59 Wis.2d 323, 208 N.W.2d 161 (1973); *In re Fabricant*, 118 Cal.App. 3d 115, 173 Cal. Rptr. 245 (1981); *Palmer* v. *Dermitt*, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); *State ex rel. Bursaw* v. *Omodt*, 338 N.W.2d 585 (Minn. 1983).[13] This conflict warrants resolution by this Court.

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[13] Although a number of the state cases cited in the text were habeas corpus actions challenging the requesting state's attempt to obtain custody of the prisoner by means of extradition rather than under the IAD, this does affect their support for the proposition that an IAD-based challenge to the validity of an indictment in the requesting state must be determined in the courts of the requesting state.

Review also is warranted on this issue because the decision of the court of appeals threatens substantially to undermine the efficient and expeditious implementation of the IAD by permitting any federal prisoner in custody in the Ninth Circuit to bring an injunctive or declaratory action in federal district court to challenge the validity under the IAD of charges underlying a request for temporary custody made by any State in the Union. Indeed, the court of appeals' reasoning would also appear to permit *state* prisoners anywhere in the Ninth Circuit to bring such a challenge to the validity of charges pending in another state, because the IAD issue involved would be a federal question that is otherwise cognizable in federal court. *Cuyler* v. *Adams*, *supra*.

There could not be a better example than this case of the mischief worked by such a result. The IAD speedy-trial and anti-shuttling issues respondent has raised in these federal proceedings are precisely the ones he also has raised in the Arizona courts by moving to quash the writ of habeas corpus ad prosequendum and to dismiss the indictment. There is absolutely no reason why he should be given a second bite at the same apple in federal district court. By allowing this, the federal courts have thwarted the basic purpose of the IAD of preventing interference with the prompt resolution of the state proceedings, because respondent's and the State's appeals to the Arizona Court of Appeals have been stayed pending the outcome of these proceedings in federal court (App., *infra*, 39a-40a).[14]

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[14] Even if a prisoner succeeds in persuading a court of the sending state to block his transfer, there is an element of futility in the whole undertaking. The requesting state is not a party to those proceedings. Accordingly, a ruling by the court in the sending state that the request need not be honored because of that court's own view that the indictment underlying the request is invalid under the IAD would not bind either the prosecutor or the courts of the requesting state or result in dismissal of the indictment there. The prisoner therefore would remain under the cloud of the charges in the requesting state, which would not be barred from obtaining

2. The court of appeals also clearly erred in its ruling on the merits that Article III(d) of the IAD now bars Arizona from trying respondent on the indictment on which its request for custody is based. See App., *infra*, 16a-19a. Arizona transferred respondent back to federal custody in 1981 only because the state court had granted respondent's own motion to dismiss the indictment. If, as the court of appeals has held, Arizona was obliged to retain custody of respondent while pursuing its appeal, despite the fact that no charges then existed on which it could try respondent, the result would be totally inconsistent with the purposes of the IAD and would require a substantial alteration in the way such cases are handled. The problem presented by the ruling below is one that can arise with some frequency, and it is important to prosecutors in receiving states under the IAD to know whether they must comply with the court of appeals' interpretation.

a. One of the principal purposes of the IAD is to minimize the disruption of a sentence that is occasioned when a prisoner in one state has criminal charges pending against him in another state. See *United States* v. *Mauro*, 436 U.S. at 353, quoting H.R. Rep. 91-1018, *supra*, at 3, and S. Rep. 91-1356, *supra*, at 3; 436 U.S. at 358 n.25. This purpose is reflected in the party states' findings in Article I of the IAD that charges outstanding against a prisoner and detainers based on such charges "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." It would be flatly inconsistent with this purpose to construe the IAD to require that the receiving state retain the prisoner in custody (often in a local jail) after the charges against him have been dismissed, instead of returning him to the custody of the sending state, where he can benefit from

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custody of him outside of the procedures of the IAD—*e.g.*, by arresting him or seeking his extradition after his release from custody.

treatment and rehabilitation. Respondent acknowledged as much in the proceedings on the IAD anti-shuttling issue in Superior Court in Arizona. There, he stated that "[i]t would have been the worst violation of Arizona's Agreement on Detainers to have held [respondent] in the Maricopa County Jail pending outcome of the appeal [from the dismissal of the indictment]," because if he had not been returned to federal prison, "he would have languished in the Maricopa County Jail for over 19 months" (E.R. 73).[15]

b. The text and structure of the IAD in any event make clear that Arizona did not violate the IAD by returning respondent to federal custody after the Superior Court granted his motion to dismiss. The situation at that point was the same as if no indictment had been returned against respondent in Arizona, and Arizona accordingly withdrew the detainer it previously had lodged against him. By the same token, when the Arizona Court of Appeals reinstated the indictment, the effect for present purposes was the same as if a *new* indictment had been returned against respondent. The IAD does not speak to the period between the dismissal and reinstate-

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[15] Respondent nevertheless argued that the State should have obtained an order from the Superior Court barring the Maricopa County Sheriff from returning him to federal prison "until a higher court could review the judgement of dismissal" (E.R. 72). In this connection, he asserted that the State should have sought such review by way of a more expeditious "special action" in the Arizona Court of Appeals, rather than by direct appeal (E.R. 72-73). See also respondent's brief (at 9-10) in the court of appeals. Contrary to respondent's contention, the IAD does not regulate the procedures or time limits under which a party state's appellate courts are to review trial court judgments and orders. The only time limits prescribed by the IAD are for bringing the prisoner to trial on pending charges, and thus are applicable only in the *trial* court. Even these time limits are tolled when the prisoner is "unable to stand trial," which presumably would include any period during which an appeal from a dismissal of the charges is pending. See also pages 23-26, *infra*.

ment of an indictment, because there are no charges pending against the prisoner during that period.

Article III(a), pursuant to which respondent was transferred to the temporary custody of Arizona, provides that whenever "there is *pending* in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner" (emphasis added), he shall be brought to trial within 180 days after delivery of his request for final disposition of those charges. See also Articles IV(a) and V(a). If an indictment is dismissed, it is no longer "pending," and the speedy trial requirement in Article III(a) is of no effect. Cf. *United States* v. *MacDonald*, 456 U.S. 1 (1982).

It would be strange indeed if the other principal substantive provision of the IAD—its anti-shuttling restriction—would nevertheless remain in effect when a charge is no longer pending, and the text of Article III(d) indicates that it does not. Article III(d) provides in relevant part (emphasis added):

> If trial is not had on any indictment, information, or complaint *contemplated hereby* prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

In the present context, an indictment "contemplated hereby" must refer to the indictment contemplated by Article III(a), which is one that is "pending." The anti-shuttling provision therefore does not bar the prisoner's transfer after the indictment has been dismissed. This conclusion is reinforced by the remedy provided in Article III(d): "the court shall enter an order dismissing the same with prejudice." This remedy could have no application where, as here, the indictment had already been dismissed before the prisoner was returned to the sending state.

Other provisions of the IAD support this construction as well. Article V(a) requires that the sending state make a prisoner available to the requesting state "in order that speedy and efficient prosecution may be had." This purpose has no application after an indictment has been dismissed, because no "prosecution may be had" unless that dismissal is reversed. In addition, Article V(e) states that "[a]t the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State." It is manifestly "consonant" with the purposes of the IAD for the receiving state to minimize disruption of the prisoner's sentence by returning him to the original place of his imprisonment for the period during which the related purpose of the IAD—securing the speedy prosecution of charges underlying a detainer—is not legally possible. See *State* v. *Grizzell*, 399 So. 2d 1091, 1092-1093 (Fla. Dist. Ct. App. 1981).

Finally, the findings and policies set forth in Article I support the interpretation that the IAD's anti-shuttling provisions do not apply in this case. It provides:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

When charges are dismissed, they no longer are "outstanding against a prisoner." The problems resulting from the detainer that was lodged when the charges were pending but "untried" no longer obtain, and a "speedy trial" of course cannot be had. Moreover, respondent did obtain an "expeditious and orderly disposition" of the charges when the Superior Court granted his motion to dismiss the indictment on state law grounds, and the "proper status" of the detainer based on that indictment was thereby determined. By requesting prompt disposition of the Arizona charges pursuant to Article III(a) and then moving to dismiss those charges on state law grounds, respondent took advantage of the IAD's mechanism for the "clearing of detainers" lodged against prisoners (H.R. Rep. 91-1018, *supra*, at 2; S. Rep. 91-1356, *supra*, at 2), and thus eliminated the uncertainty regarding his status to the extent it was possible to do so while the State's appeal of the dismissal of the indictment was still pending. Arizona's return of respondent to federal custody and its withdrawal of the detainer at that point served the interests of all concerned, and they were precisely the sort of "cooperative procedures" contemplated by Article I of the IAD.

This conclusion also is supported by this Court's explanation in *Mauro* that the "real concern" of the IAD's anti-shuttling provision is that "if the prisoner were returned to the sending State prior to disposition of the charges in the receiving State, the detainer previously lodged against him would remain in effect with all its attendant problems." 436 U.S. at 361 n.26. In this case, respondent was returned to federal custody after, not prior to, disposition of the charges by the Superior Court in Arizona, and the detainer lodged against him did not "remain in effect with all its attendant problems"; it was withdrawn.

c. The holding of the court of appeals that the Arizona indictment is invalid conflicts with the decisions of other courts—including the Arizona trial court in respondent's

case—that have held that relief is not warranted under the IAD's anti-shuttling provisions where the defendant was returned to the sending state after a delay in the proceedings that the defendant himself brought about, where the return was in the best interests of the prisoner, or where the anti-shuttling provision's fundamental purposes of preventing abuse by the prosecution and interruption of the prisoner's rehabilitation are not implicated. These courts have reasoned, inter alia, that the provisions of the IAD that require the receiving state to proceed expeditiously to trial assume that prisoners want a speedy disposition, and that the IAD must be read in light of its purpose to establish cooperative procedures for transfers among states. See, *e.g.*, *Sassoon* v. *Stynchombe*, 654 F.2d 371, 373-375 (5th Cir. 1981); *Malone* v. *United States*, 482 A.2d 768 (D.C. 1984); *People* v. *Meyers*, 124 Mich. App. 148, 335 N.W.2d 189, 191-192 (1983); *State ex rel. Fetters* v. *Hott*, 318 S.E. 2d 446, 448-449 (W. Va. 1984); *State* v. *Allen*, 237 S.E.2d 64, 67 (S.C. 1977); *People* v. *Dye*, 69 Ill. 2d 298, 302-304, 371 N.E.2d 630, 632 (1977); *Neville* v. *Friedman*, 67 Ill. 2d 488, 367 N.E.2d 1341 (1977), cert. denied, 437 U.S. 903 (1978); *State ex rel. Stanley* v. *Davis*, 569 S.W. 2d 202, 209-210 (Mo. Ct. App. 1978); *People* v. *Squitieri*, 91 Misc.2d 290, 292-294, 397 N.Y.S.2d 888, 891 (Sup. Ct. 1977).

It follows *a fortiori* that dismissal is not required under the IAD's anti-shuttling provision where, as here, the defendant moved not merely to delay the criminal prosecution, but to dismiss it altogether—which would almost inevitably result in his prompt return to his original place of imprisonment. By making such a motion, the defendant must be deemed to have made a deliberate election to forgo his right under the IAD to be brought to trial during his first period of temporary custody in the receiving state, and he must accept the consequences of that voluntary choice. Cf. *United States* v. *Scott*, 437 U.S. 82, 93-94, 98-101 (1978). Nor would

the retransfer of the prisoner for trial on the charges after they have been reinstated on appeal even remotely constitute the sort of abuse by the prosecution in the receiving state to which the IAD's anti-shuttling provisions were directed.

This conclusion also is supported by the decisions of other courts of appeals holding that a prisoner may be deemed to have waived the protections of the IAD—including its anti-shuttling provisions—by taking or requesting actions inconsistent with those protections, even without a showing of a knowing and intelligent waiver. See, *e.g.*, *United States* v. *Lawson*, 736 F.2d 835, 837-839 (2d Cir. 1984); *United States* v. *Hines*, 717 F.2d 1481, 1486-1487 (4th Cir. 1983), cert. denied, No. 83-1155 (May 29, 1984); *United States* v. *Odom*, 674 F.2d 228, 230 (4th Cir.), cert. denied, 457 U.S. 1125 (1982); *United States* v. *Black*, 609 F.2d 1330-1334 (9th Cir. 1979), cert. denied, 449 U.S. 847 (1980); *Gray* v. *Benson*, 608 F.2d 825, 826-827 (10th Cir. 1979); *United States* v. *Eaddy*, 595 F.2d 341, 344-345 (6th Cir. 1979); *United States* v. *Hobson*, 686 F.2d 628, 629 (8th Cir. 1982); *Camp* v. *United States*, 587 F.2d 397, 399-400 (8th Cir. 1978). In this case, even before the Superior Court granted respondent's motion to dismiss, he had requested the Superior Court to transfer him back to federal custody pending trial. See note 4, *supra*. That request is a likely source of the Superior Court's decision to include in its order of dismissal the further directive that respondent be returned to federal custody. Compare *United States* v. *Black*, *supra*; *Gray* v. *Benson*, *supra*.

The court of appeals' countenancing of a manipulation of the IAD's protections in this case conflicts with the foregoing decisions that have declined to apply the anti-shuttling provisions and other IAD protections in a manner inconsistent with their overriding purposes. The decision below also threatens to disrupt cooperation among party states in the Ninth Circuit and to undermine the rehabilitative goals of the IAD by requiring

the receiving state to retain a prisoner in what amounts to pretrial custody for an indefinite period pending appeal of a dismissal of the charges against him. Review on the merits of the IAD issue accordingly is warranted as well.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

MAY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1951

Civ. No. 83-0247-RHS

JAMES ROBERT BURRUS, PETITIONER-APPELLEE

v.

CHARLES TURNBO, WARDEN, RESPONDENT-APPELLANT

On Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Argued January 11, 1984
Submitted January 27, 1984

[Filed Sept. 25, 1984]

OPINION

Before: GOODWIN, PREGERSON, and NELSON, Circuit Judges.

PREGERSON, Circuit Judge:

INTRODUCTION

Warden Charles Turnbo of the Pleasanton Federal Correctional Institution (Warden) appeals from an order of the United States District Court for the Northern District of California. The order permanently enjoins the Warden from recognizing a writ of habeas corpus *ad prosequendum* [1] asking him to transfer petitioner James Robert Burrus (Burrus) to the custody of Arizona authorities. Arizona seeks the transfer for the purpose of trying Burrus on various fraud and forgery counts.

The district court granted the injunction because Arizona had once before obtained custody of Burrus to prosecute these charges, but had returned him to the federal authorities before bringing him to trial.

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[1] The district court's order mistakenly refers to the document that Arizona authorities presented to the Warden as a "detainer." Actually, the state's prosecutors have presented a writ of habeas corpus *ad prosequendum*, which was issued by an Arizona state court. This writ is used by one sovereign to obtain and try prisoners held in another sovereign's jurisdiction. *See Carbo v. United States*, 364 U.S. 611, 614-15 (1961).

The writ of habeas corpus *ad prosequendum* is not a "detainer" within the meaning of the Interstate Agreement on Detainers. *United States v. Mauro*, 436 U.S. 340, 349 (1978). But when the prosecution initially files a detainer against a prisoner, and later seeks custody by means of the writ, the provisions of the IAD are activited nonetheless. *Id.* at 361-62. Because Arizona filed a detainer before presenting the writ, the district court's mischaracterization does not affect our disposition of the case.

The court reasoned that in so doing, Arizona had flatly violated the speedy trial provisions of the Interstate Agreement on Detainers (IAD), Pub. L. No. 91-538, 84 Stat. 1397 (1970), *codified at* 18 U.S.C. app. §§ 1-8 (1982).[2]

The Warden challenges the injunction on three grounds. First, he contends that the district court interfered with pending state criminal proceedings and thereby offended the doctrine of equitable restraint as articulated in *Younger v. Harris*, 401 U.S. 37 (1971). Second, the Warden argues that under the peculiar circumstances of this case, the IAD *required* Arizona temporarily to return Burrus to federal custody, and therefore that the IAD cannot now penalize Arizona for attempting to resume its prosecution of him. Third, the Warden asserts that Burrus, not Arizona authorities, prevented the trial from taking place before the IAD's speedy trial deadline had expired. According to the Warden, Burrus asked for and received a lengthy pretrial continuance that made it impossible for Arizona to bring Burrus to trial on time.

For the reasons expressed below, we reject all of these arguments and affirm the district court.

BACKGROUND

A. *Interstate Agreement on Detainers*

The United States and Arizona are parties to the IAD, a compact designed, according to article I, to "encourage the expeditious and orderly disposition of [outstanding criminal] charges and determination of

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[2] The IAD is reprinted in an appendix to title 28 of the United States Code. The IAD articles that we discuss here are all found in section 2 of the appendix.

the proper status of any and all detainers based on untried indictments, informations, or complaints." Each state that is party to the compact has enacted and codified the IAD as its own law. *See* 18 U.S.C. app. § 2 (1982); Ariz. Rev. Stat. Ann. § 31-481 (West 1976). Article II(a) defines the United States as a "state" for purposes of administering the agreement.

The detainer is central to the administration of the IAD. A detainer is simply a document notifying one state (the sending state) that another state (the receiving state) wants to prosecute a prisoner that the sending state is holding. Once lodged with the sending state, a detainer remains in effect indefinitely, and therein lies the problem. Before the IAD, the sending state was under no compulsion, other than comity, to send the prisoner to the receiving state. Usually, however, the sending state did transfer the prisoner. But having accepted the transfer, the receiving state could prosecute immediately, retain custody but postpone the trial, or shuttle the prisoner back to the sending state until the receiving state was ready to proceed against him and renew its request for custody [3]—all while the detainer remained in effect.

Thus, the detainer has several deleterious effects. First, it may make the prisoner ineligible for desirable work or educationl assignments. If the prisoner is constantly shuttled from one facility to another, prison officials may be reluctant to permit him to participate in rehabilitation programs. Second, a de-

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[3] *But see Smith v. Hooey*, 343 U.S. 374, 380, 383 (1969) (holding that the sixth amendment commands, though very generally, that a state must "make a diligent, good-faith effort" to bring a prisoner to trial).

tainer reduces the prisoner's incentive to participate in work, education, and other programs that help rehabilitate him and improve his chances for early parole. Uncertain whether he will have to serve another, non-concurrent sentence in the future, the prisoner loses his interest in improving himself in the present. Third, a detainer tells the prisoner that he may have to stand trial elsewhere, but does not provide him with a vehicle for going there immediately to secure witnesses and take other steps to preserve his defense. *See, e.g., United States v. Mauro*, 436 U.S. 340, 353 n.25, 360 (1978) (citing authoritative sources); *accord United States ex rel. Esola v. Groomes*, 520 F.2d 830, 837 (3d Cir. 1975). Before the IAD existed, some prison officials and state prosecutorial authorities abused the detainer system. Sometimes, authorities in potential receiving states lodged detainers not to obain prisoners for the purpose of putting them on trial, but instead to make life more difficult for them in the prisons where they were already incarcerated. *See, e.g., United States v. Ford*, 550 F.2d 732, 737-40 (2d Cir. 1977) (recounting cases of such abuse), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978).

To correct these evils, article III(a)[4] gives the prisoner the right to demand that the receiving state swiftly dispose of any outstanding charges:

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[4] Under a companion provision, the receiving state's prosecuting authority may on its own motion dispose of outstanding charges against a prisoner detained in another state. Article IV(a) provides:

> The appropriate officer of the jurisdiction in which an untried indictment . . . is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State

> [W]henever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment . . . on the basis of which a detainer has been lodged against the prisoner, *he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer* . . . written notice of the place of his imprisonment and *his request for a final disposition* to be made of the indictment . . . .

18 U.S.C. app. § 2, art. III(a) (1982) (emphasis added).

Furthermore, article III(d)[5] penalizes the receiving state for failure to prosecute a prisoner transferred under the IAD:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, *such indictment, information, or complaint shall not be of any further force or*

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made available . . . upon presentation of a written request for temporary custody . . . .

Article IV(c) adds:

> In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State . . . .

[5] The companion provision, article IV(e), provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment . . . such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

> *effect, and the court shall enter an order dismissing the same with prejudice.*

Id. art. III(d) (emphasis added).

Finally, article V(g) vests the sending state with jurisdiction over the prisoner for all purposes other than final disposition of outstanding indictments in the receiving state:

> For all purposes other than that for which temporary custody as provided in this agreement is exercised *the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State* . . . .

Id. art. V(g) (emphasis added).

B. *Procedural Posture*

Burrus, a federal prisoner at the Englewood Federal Correctional Institution in Colorado, learned that the State of Arizona had lodged a detainer against him with federal authorities. On November 23, 1980, pursuant to article III of the IAD, he filed[6] a request asking Arizona to dispose of all outstanding charges against him.[7] Arizona accepted that request, and on

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[6] Burrus actually sent the appropriate papers some days earlier, but article III began to run on the date that the officials of the receiving state took delivery of those papers. For IAD purposes, then, Burrus "filed" on November 23, 1980.

[7] The Warden contends that article IV governs this case. According to the Warden, if article IV(c) applies, Arizona still has time to try Burrus because 120 days did not pass between the date that Burrus arrived in Arizona and the date that Arizona sent him back to federal custody.

The record demonstrates otherwise. Burrus invoked article III by requesting a speedy disposition of the outstanding

February 11, 1981, federal athorities transferred Burrus to the custody of Arizona authorities.

The State arraigned Burrus in Maricopa County Superior Court on February 20 and later set various trial dates. Along the way, both sides made several motions. On March 20, Burrus asked for and received a 32-day continaunce of the deadline for filing pre-trial motions. Later, the trial court, acting sua sponte, twice continued the original trial date of April 8—initially to May 11, then to May 21.

On May 21, Burrus filed a motion to dismiss the Arizona indictment. He argued that in failing to bring him to trial by May 12, 1981, Arizona had violated the state's own speedy trial rule. *See* Ariz. R. Crim. P. 8.3(a).[8] Rule 8.3(a) reinforces Ari-

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Arizona charges. Arizona accepted this request. Letter from Jeffrey L. Arbetman, Assistant Attorney General, State of Arizona, to John T. Hadden, Warden, Englewood Federal Correctional Institution, at 2 (Jan. 13, 1981). Therefore, article III governs.

[8] Ariz. R. Crim. P. 8.3(a) provides:

> Within 90 days after receipt of a written request from any person charged with a crime and incarcerated without the state . . . the prosecutor shall take action as required by law to obtain such person's presence for trial. *Within 90 days after the defendant has been delivered into the temporary custody of the appropriate authority of this state, he shall be brought to trial.*

(Emphasis added.)

The legislative history reveals that Rule 8.3 is designed "primarily to supplement the provisions of the Interstate Agreement on Detainers." Ariz. R. Crim. P. 8.3(a) comment, para. 2. The rule's framers also said the rule means that the prisoner "must" be tried within 90 days, and that a

zona's adherence to the IAD's speedy trial provisions. It required Arizona to try Burrus within 90 days of his delivery into Arizona's temporary custody. On May 22, 179 days after Burrus had filed his request for speedy disposition of the outstanding charges (but 100 days after federal authorities had delivered him to Arizona), the Maricopa County Superior Court dismissed the indictment with prejudice pursuant to Rule 8.3(a). *State v. Burrus*, Crim. No. 106900 (Ariz. Super. Ct. Maricopa County May 22, 1981) (Myers, J.) (unpublished order). Arizona authorities returned Burrus to federal custody at Englewood on May 29, and the Maricopa County sheriff officially withdrew the Arizona detainer against him on June 6.

Meanwhile, on May 22, Arizona appealed the superior court's decision. On October 7, 1982—almost a year and-a-half-later—the Arizona Court of Appeals reversed the dismissal, reinstated the indictment, and remanded the case for trial. *State v. Burrus*, 134 Ariz. App. 251, 655 P.2d 371 (1982). The state appeals court ruled that by obtaining his lengthy continuance, Burrus had waived his right under Ariz. R. Crim. P. 8.3(a) to be tried within 90 days of

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violation of this time limit constitutes grounds for "dismissal of the charges with prejudice." *Id.* comment, para. 4.

In this case, the Maricopa County Superior Court dismissed the indictment precisely because Arizona failed to adhere to these stringent commands. Originally, the superior court, the prosecution, and defense counsel all thought that a different Arizona Rule of Criminal Procedure governed the case. That other rule, which governs prisoners already held within Arizona, would have permitted Arizona to try Burrus by May 21 instead of by May 12. Later, however, defense counsel realized that Burrus was an out-of-state prisoner who was temporarily in Arizona's custody, and petitioned the superior court to correct the error accordingly.

arriving in the state, and that Arizona had 32 more days in which to put Burrus on trial. *Id.* at ——, 655 P.2d at 373. On December 29, 1982, Burrus received notice that Arizona had renewed its remand for temporary custody, this time by obtaining a writ of habeas corpus *ad prosequendum* in Maricopa County Superior Court.

Burrus, now imprisoned in the federal penitentiary at Pleasanton, California, decided to explore two separate avenues in his search for relief. First, he petitioned the Arizona courts. He reasoned that even if Arizona had complied with its own speedy trial law, the state had nevertheless violated the IAD. He asked the state superior court to quash the writ of habeas corpus *ad prosequendum* and to dismiss the reinstated indictment because Arizona, in failing to try him before sending him back to federal custody, had violated article IV(e) of the IAD. The superior court denied the requests. *State v. Burrus*, Crim. No. 106900 (Ariz. Super. Ct. Maricopa County Jan. 12, 1983) (Derickson, J.) (unpublished order). Burrus also asked the superior court to dismiss the reinstated indictment because Arizona, in failing to try him before returning him to federal custody, had violated article III(d). The superior court granted this motion. *State v. Burris*, Crim. No. 106900 (Ariz. Super. Ct. Maricopa County Mar. 24, 1983) (Patterson, J.) (unpublished order). Burrus appealed the former ruling and Arizona the latter to Division One of the Arizona Court of Appeals, where both matters are still pending.

Second, Burrus petitioned the federal courts. He filed a pro se petition in the Northern District of California seeking three types of relief: a "Writ of Habeas Corpus . . . to quash" Arizona's writ of

habeas corpus *ad prosequendum*,[9] a declaratory judgment setting aside the Arizona writ as unlawful under the IAD, and a permanent injunction preventing the Warden from surrendering Burrus to Arizona for the purpose of prosecuting the untried indictment.

The Warden, appearing through the United States Attorney, and Arizona, appearing through its attorney general, opposed the motions. The district court denied habeas as 'not proper under the circumstances," but granted the permanent injunction.[10] Relying on the plain language of article III(d), the court ruled that the Arizona indictment had no further force or effect. *Burrus v. Turnbo*, Civ. No. 33-0247-RHS (N.D. Cal. Mar. 7, 1983) (unpublished order).

The Warden brought the appeal now before us. The United States Attorney filed a brief arguing the cause on behalf of the Warden and, apparently, the State of Arizona.

On appeal, Burrus says that this is the very type of case the IAD was designed to prevent. He claims that permitting the Warden to shuttle him back to Arizona will once again interrupt his college education, impair his efforts to obtain a favorable prisoner classification, and postpone his double hernia operation.

STANDARD OF REVIEW

To issue a permanent injunction, the district court must find that the movant has no adequate remedy at law and will suffer irreparable harm if the court de-

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[9] Complaint for Petitioner at 1, *Burrus v. Turnbo*, Civ. No. 83-0247-RHS (N.D. Cal. Mar. 7, 1983).

[10] Apparently, the district court did not rule on the request for declaratory relief.

nied equitable relief. *See, e.g., Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). The decision to grant or deny injunctive relief " 'rests with the sound discretion of the trial court and . . . will not be disturbed unless there has been a clear abuse of it.' " *SEC v. Arthur Young & Co.*, 590 F.2d 785, 787 (9th Cir. 1979) (citation to quotation omitted). Nevertheless, conclusions of law upon which the injunction is based "are freely reviewable." *Sports Form, Inc. v. UPI*, 686 F.2d 750, 752 (9th Cir. 1982).

ANALYSIS

The Warden contends that the *Younger* doctrine, the terms of the IAD itself, and Burrus's motion to continue his trial—which allegedly constitutes a waiver of his speedy trial right under the IAD—all require us to reverse the district court. We consider each argument in turn.

A. *The Younger Doctrine*

Younger v. Harris, 401 U.S. 37 (1971), stands for the proposition that our system of government does not permit a federal court to enjoin state court proceedings absent very special circumstances. *Id.* at 43. "Our Federalism" recognizes state governments as separate and independent sovereigns whose courts retain great power to experiment with the law and interpret the Constitution—at least in the first instance—for themselves. *Id.* at 44; *accord Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943); *Ex Parte Young*, 209 U.S. 123, 161-63 (1908).

The Warden argues that the district court has offended the branch of the *Younger* doctrine banning piecemeal intervention in state court proceedings. *See, e.g., Perez v. Ledesma*, 401 U.S. 82, 84 (1971).

Even though the district court directed its order to the Warden, a federal official, that court effectively held up the State of Arizona's attempt to prosecute Burrus. The Warden contends that we should abstain and permit the Arizona Court of Appeals to decide whether the state is entitled to regain temporary custody of Burrus.

The paradigm *Younger* problem arises when a state criminal defendant, fearing a violation of his federal constitutional rights in a pending prosecution, petitions a federal court to restrain the state court from proceeding against them. *E.g.*, *Hicks v. Miranda*, 422 U.S. 332 (1975); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971); *Younger v. Harris*, 401 U.S. 37 (1971); *see also Developments in the Law—section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1318 (1977) (extending outline of paradigm *Younger* case to some non-criminal state proceedings). The *Younger* doctrine counsels restraint in these cases because

> federal equitable intervention is not warranted if the federal plaintiff [i.e., the state defendant] can secure a full and fair day in court on his [federal] constitutional claims by raising them by way of defense in a state enforcement proceeding which is already underway or is imminent anyway. The central notion is that defending the state prosecution provides an adequate remedy, one that is the substantial equivalent of the remedy available in the federal court.

P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 283 (Supp. 1981); *accord id.* at 1043 (2d ed. 1973) (("[T]he principal thrust of the

[]Younger doctrine is that a state criminal defendant's *federal* constitutional rights should usually be raised and definitively adjudicated in the state criminal case . . . ." (emphasis in original)).

But *Younger* is inapposite here for three reasons.

First, the case before us involves a supervening law, the IAD. The IAD is a treaty between two separate and independent sovereigns, the United States and Arizona. By signing the treaty, each gave up part of its "right" to hold prisoners that the other sovereign wants. *United States ex rel. Esola v. Groomes*, 520 F.2d 830, 835 (3d Cir. 1975).[11] In exchange, each obtained the right, if it meets certain conditions outlined in the compact, to obtain wanted prisoners from the other soverign. Before the IAD existed, neither sovereign could compel the other to hand over prisoners like Burrus. *See generally Smith v. Hooey*, 343 U.S. 374 (1969). Now they can.

What this means is that Burrus is *not* asking a federal court to eliminate the prerogative of a sovereign state's court to interpret the federal Constitu-

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[11] The Third Circuit explained in full:

> The Federal Government, through joinder in the Agreement, forfeited its right to exclusive control over [a federal prisoner] during the term of the sentence imposed by the district court. Concomitantly, the United States gained the right not to have its various rehabilitative programs unduly hampered by numerous, unnecessary transfers to a jurisdiction with outstanding criminal charges. In short, the Agreement cannot be viewed as a single enactment by a single legislative body. *Rather it is a law binding on at least two sovereigns . . . . Rights arising under the Agreement flow from the actions of both of the party jurisdictions.*

United States ex rel. Esola v. Groomes, 520 F.2d 830, 835 (3d Cir. 1975) (emphasis added).

tion in the first instance. Instead, he *is* asking a federal court to decide whether the United States would violate its treaty with Arizona if the Warden retransferred Burrus to Arizona. Because a violation of the IAD offends not only state, *see* Ariz. Rev. Stat. Ann. § 31-481 (West 1976), but also fereral, *see* 18 U.S.C. app. § 2 (1982), law, jurisdiction to adjudicate IAD violations lies co-equally with both sovereigns.

Therefore, the usual notions about comity do not obtain. The United States has as much right as Arizona to police the IAD and to wrestle in the first instance with substantial federal questions arising from it. *See Cuyler v. Adams*, 449 U.S. 433, 442 (1931) ("[T]he Detainer Agreement is a congressionally sanctioned interstate compact the interpretation of which presents a question of federal law."); *Tinghitella v. California*, 718 F.2d 308, 311 (9th Cir. 1983) (per curiam) (citing with approval *Cuyler v. Adams*); *see also Brown v. Wolff*, 706 F.2d 902, 904-05 (9th Cir. 1983) (Because the IAD is federal law, a federal district court may grant habeas corpus relief under 28 U.S.C. § 2254 (1982) to remedy violations of the compact); *Bedwell v. Harris*, 451 F.2d 122, 122 (1t0h Cir. 1971) (per curiam) ("In a proper case it is the duty of the federal court to relieve a prisoner from the burden of a state detainer and the court has jurisdiction to do so.").

Second, the IAD itself suggests that in this case, jurisdiction properly lies in federal rather than state court. Article V(g) says that for all purposes other than the receiving state's disposition of outstanding charges, the sending state—here, the federal sovereign—retains jurisdiction over the prisoner.[12]

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[12] *See supra* p. 5 (quoting article V(g)).

The case before us is not an appeal from a judgment on the merits of the charges that Arizona has preferred against Burrus. Instead, it is an appeal from the district court's determination that the United States will participate in a violation of article III(d) if the Warden transfers Burrus back to Arizona. Therefore, article V(g) vests us with jurisdiction to relieve Burrus of this burden.

Third, as long as Burrus remains a federal prisoner in federal custody, only the federal authorities can send him to Arizona again. Consequently, an injunction preventing Burrus's transfer to Arizona must be directed to the Warden, and only a federal district court can issue such an injunction. *Cf. Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871) (denying state courts authority to issue writs of habeas corpus on behalf of prisoners in federal custody).

Because the *Younger* doctrine does not apply to this case, we proceed to the merits.

B. *Applying the IAD*

1. *Warden's interpretation of article III(d).* Relying on article III(d), the district court ruled that Arizona had violated the IAD. Article III(d) simply says that if the receiving state fails to bring a prisoner to trial, the trial court must "enter an order dismissing the [indictment] with prejudice." Applying the Arizona Rules of Criminal Procedure, which supplement the IAD, the Maricopa County Superior Court did exactly that. As a result, the federal district court enjoined the Warden from returning Burrus to Arizona.

The Warden wants this court to apply a strained interpretation of the IAD to this case. The Warden contends that when the superior court dismissed the indictment with prejudice, the court had entered a

"final disposition" within the meaning of article III. Without a valid indictment, Arizona no longer had any basis for holding Burris, so it had to return him to federal custody. Now that the Arizona Court of Appeals has reinstated the indictment, however, the disposition is no longer "final" and Arizona again has jurisdiction to prosecute.

This argument fails to square not only with the plain terms of article III(d), but also with the purpose behind the IAD. The member states adopted the IAD to promote the speedy disposition of outstanding charges and to mitigate the evils that resulted from shuttling prisoners to and from states that had lodged detainers. *See, e.g., Mauro*, 436 U.S. at 360; *United States v. Dixon*, 592 F.2d 329, 334 (6th Cir.) (citation omitted), *cert. denied*, 441 U.S. 951 (1979). The Warden's reading of article III would turn the meaning of the IAD upside-down. In interpreting the speedy trial provision of Article IV, which is virtually identical to that in article III, the Supreme Court held that the terms of the IAD mean what they say:

> [W]e view Art. IV(a) as requiring commencement of trial within 120 days whether the receiving State initiates the disposition of charges underlying a detainer it has previously lodged against a state prisoner. Any other reading of this section would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the Agreement intended to arise from such an action.

Mauro, 436 U.S. at 364 (footnotes omitted).

We think the mandatory language and stringent penalties that the IAD sets out require party states to adhere strictly to the compact's provisions. *See United States v. Eaddy*, 595 F.2d 341, 345 (6th Cir. 1979); *see also Hughes v. District Court*, 593 P.2d 702, 705 (Colo. 1979) (discussing absoluteness of IAD's terms). Therefore, we reject the Warden's strained interpretation of the treaty.

2. *Burrus' motion for continuance and the 32-day delay.* On March 20, 1981, Burrus successfully moved the superior court for a 32-day continuance so that he could prepare various pre-trial motions. The Warden argues that because Burrus caused this delay, Burrus has waived his speedy trial right. As a result, Arizona may obtain Burrus for the purpose of bringing him to trial in the month that remains on his speedy trial clock.

A prisoner's speedy trial right under the IAD is personal to him. Therefore, by delaying the state's attempt to bring him to trial, a prisoner may waive that right. *See, e.g., Brown v. Wolff*, 706 F.2d 902, 907 (9th Cir. 1983); *United States v. Black*, 609 F.2d 1330, 1334 (9th Cir. 1979), *cert. denied*, 449 U.S. 847 (1980).

We agreed with both the Warden and the Arizona Court of Appeals that the state should have excluded the 32 days from its speedy trial calculations. Nonetheless, we find the Warden's contention now irrelevant. Article III(d) gives the receiving state one opportunity to try a prisoner in its temporary custody. If it returns the prisoner to the sending state before doing so, the treaty's plain terms declare that the pertinent "indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice."

In the case before us, Arizona failed to put Burrus on trial before it returned him to federal custody. This act brought the curtain down on Arizona's prosecution. The reason *why* Arizona failed to put Burrus on trial is of no moment. It happened, in this case, that Arizona returned Burrus to federal authorities because the superior court found that the state had violated its own speedy trial rule and dismissed the indictment. Later, the state's court of appeals disagreed with the superior court's reading of the rule and reinstated the indictment. But once Arizona returned Burrus before completing the prosecution, the state automatically lost its right to obtain temporary custody under article III(d). *See United States v. Cyphers*, 556 F.2d 630, 635 (2d Cir.) (interpreting companion provision in article IV(e)), *cert. denied*, 431 U.S. 972 (1977).

The Warden responds that our decision in *Brown v. Wolff* reads article III(d) differently. We disagree. In *Wolff*, we held the State of Nevada had not violated article III(d)'s 180-day speedy trial provision. We found that the prisoner, by explicitly agreeing to two lengthy continuances, had waived his right to be tried within article III(a)'s speedy trial period.

The critical difference between *Wolff* and this case is that in *Wolff*, Nevada never returned the prisoner to the sending state. In this case, however, Arizona transferred Burrus back to federal custody. Arizona could have maintained custody over Burrus by asking its court of appeals for an emergency stay or an expedited appeal. But it did not. Arizona thus forfeited its sole opportunity to prosecute Burrus without violating the anti-shuttling provision in article III(d).

CONCLUSION

In light of the above analysis, we conclude that the district court did not abuse its discretion by permanently enjoining the Warden from honoring Arizona's renewed demand for temporary custody. Because Burrus had no adequate remedy at law that would have preserved his rights under the IAD, we also conclude that the district court properly exercised its equitable power to grant an injunction.

The judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1951

JOHN ROBERT BURRUS, PETITIONER-APPELLEE

vs.

CHARLES TURNBO, WARDEN, RESPONDENT-APPELLANT

[Filed Jan. 4, 1985]

ORDER

Before: GOODWIN, PREGERSON, and NELSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. 83-0247 RHS

JAMES ROBERT BURRUS, PETITIONER

v.

CHARLES TURNBO, WARDEN, RESPONDENT

[Filed Mar. 9, 1983]

ORDER

The above entitled matter coming on for hearing, and the Court having examined the file, and having heard the statements of counsel, and being fully advised in the premises, enters the following Order:

FINDINGS OF FACT

The Court finds the following facts to be true based upon the stipulation of the parties to this action:

1) On November 23, 1980 petitioner's request for disposition of untried indictments as outlined in the Interstate Agreement on Detainers was accepted by the State of Arizona.

2) On February 11, 1981, the United States Bureau of Prisons surrendered temporary custody of Petitioner to the State of Arizona.

3) On May 22, 1981, the Arizona indictment was dismissed with prejudice.

4) On May 29, 1981, the defendant was returned to federal custody in Englewood, Colorado.

5) On June 6, 1981, the Arizona detainer was officially withdrawn by the Maricopa County Sheriff.

6) On December 29, 1982, petitioner received a notice of request for temporary custody from the Arizona Attorney General.

CONCLUSIONS OF LAW

Article III(d) of the Interstate Agreement on Detainers, 18 United States Code Appendix, governs this case.

This section reads:

> If the trial is not had on any indictment, information, or complaint contemplated hereby, prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect.

Since Petitioner was returned to federal custody by the States of Arizona without the trial of his Arizona case being had, petitioner is entitled to the clear benefits provided by the Interstate Agreement on Detainers.

The Court finds that Petitioner's Petition for Writ of Habeas Corpus is not proper under the circumstances, and therefore said Petition is discharged.

The Court further finds that Petitioner's application for a permanent injunction against Respondent

is well taken, and the Court permanently enjoins Respondent, Warden from recognizing in any fashion the Arizona detainer filed December 29, 1982, and Respondent shall not transfer Petitioner from within the jurisdiction of this Court if said transfer would frustrate in any manner this injunction, and the said Arizona detainer shall be of no force and effect as between the parties herein and shall not be used in any respect to affect the detriment of Petitioner his custody status at Federal Correctional Institution. Pleasanton, California.

Dated: March 7, 1983

IT IS SO ORDERED:

/s/ Robert H. Schnacke
ROBERT H. SCHNACKE
United States District Judge

APPENDIX D

IN THE SUPERIOR COURT
OF MARICOPA COUNTY, STATE OF ARIZONA

5-22-81

WILSON D. PALMER
C. SUE FREMOUW

106900

HON. ROBERT L. MYERS

STATE OF ARIZONA

vs.

JAMES ROBERT BURRUS

The Court having considered the Defendant's Motion to dismiss and the State's computation of speedy trial time limits and having reviewed the file and record herein and the authorities cited by counsel, the Court finds that pursuant to Rule 8.3 (A) Rules of Criminal Procedure, that the last day for trial was May 12, 1981, and that there is no excludable time chargeable to the Defendant herein, therefore;

IT IS ORDERED that the Defendant's Motion to dismiss is granted and that the Indictment is dismissed with prejudice.

FURTHER ORDERED that the hearing set on Motions of May 22, 1981, is vacated.

FURTHER ORDERED that the Defendant be released by the Sheriff of Maricopa County into the custody of the United States Marshall.

Attorney General
By: JEFF ARBETMAN

DAVID BRAUER
Maricopa County Jail

APPENDIX E

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CR 5401

Department B

STATE OF ARIZONA, APPELLANT

v.

JAMES ROBERT BURRUS, APPELLEE

An Appeal from the
Superior Court of Maricopa County

Cause No. CR-106900

The Honorable Robert L. Myers, Judge

REVERSED AND REMANDED

[Filed Oct. 7, 1982]

Robert K. Corbin, Attorney General, By William J. Schafer III, Chief Counsel, Criminal Division,

Gerald R. Grant, Assistant Attorney General, Attorneys for Appellant, Phoenix.

Ross P. Lees, Maricopa County Public Defender, By Terry J. Adams, Deputy Public Defender, Attorneys for Appellee, Phoenix.

OPINION

GRANT, Judge

This is an appeal by the State of Arizona from the trial court's May 22, 1981 order dismissing the indictment, with prejudice, for failure of the state to bring the defendant to trial within the time limits of Arizona's speedy trial rules.

The record reflects that the defendant Burrus was charged by indictment filed May 15, 1979, with one count of fraudulent scheme and five counts of forgery. He remained a fugitive from justice until arrested in Idaho and was released to the custody of Arizona authorities on February 11, 1981 pursuant to the Agreement on Detainers Act. A.R.S. §§ 31-481, 31-482.

On February 20, 1981, the defendant was arraigned and trial was set for April 8, 1981. Pretrial motions were ordered to be filed no later than March 19, 1981 and the last day for trial was computed to be May 21, 1981. This date, computed pursuant to rule 8.2(b), Ariz. R. Crim. P., 17 A.R.S., was ninety days after defendant's February 20, 1981 arraignment. Although not realized by the court nor counsel, the last day for trial should have been computed as May 12, 1981, which pursuant to rule 8.3 was ninety days after defendant was taken into custody by Ari-

zona on February 11, 1981. Rule 8.3(a) reads in pertinent part, "Within 90 days after the defendant has been delivered into the temporary custody of the appropriate authority of this state, he shall be brought to trial." The comment to this rule states that violation of this time limit is grounds for dismissal of the charges with prejudice under rule 8.6.

As noted above, the original last day for trial was erroneously computed to be May 21. This date was never changed. There were no continuances of the trial beyond this date. It was on May 21, the day set for trial, that counsel for the defendant asserts that he first discovered the error in computing the last day. He immediately filed a motion to dismiss and a motion to vacate his motion to suppress. The motion was based on the violation of rule 8.3(a), Ariz. R. Crim. P. After a hearing, the trial judge granted the motion and dismissed the charges with prejudice. The trial court specifically found that there was no excluded time chargeable to the defendant.

The state claims, however, that the trial court failed to exclude a thirty-two (32) day delay caused by the defendant's requested extension of time to file pretrial motions and that the trial court abused its discretion in dismissing the indictment with prejudice.

The record reflects that the following motions were filed and orders entered:

February 20, 1981—trial originally set for April 8, 1981;

March 20, 1981—on defendant's motion, the time for filing pre-trial motions was extended to April 20, 1981;

March 24, 1981—defendant filed motion to suppress;

March 26, 1981—defendant filed motion in limine and the trial court ordered that pre-trial motions be set for hearing on April 10, 1981;

April 7, 1981—on the court's own motion, the trial was continued to May 11, 1981;

April 10, 1981—on the state's motion, the hearing on defendant's pre-trial motions was continued to April 24, 1981;

April 16, 1981—defendant filed motion to remand for new finding of probable cause;

April 21, 1981—hearing on motion to remand set for April 24, 1981;

April 24, 1981—parties stipulate to extend hearing on motions to May 22, 1981;

May 11, 1981—on the court's motion, the trial was continued from May 11, 1981 to May 21, 1981.

In its opening brief, the state argues that the 32 day extension of time for filing pretrial motions from March 19, 1981 to April 20, 1981 was a delay occasioned on behalf of the defendant which should have been excluded pursuant to rule 8.4(a).[1] In support of this argument, the state relies primarily upon

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[1] Rule 8.4 Ariz. R. Crim. P., 17 A.R.S. provides:

The following periods shall be excluded from the computation of the time limits set forth in Rules 8.2 and 8.3:

a. Delays occasioned by or on behalf of the defendant, including, but not limited to, delays caused by an examination and hearing to determine competency, the defendant's absence or incompetence, or his inability to be arrested or taken into custody in Arizona.

Stone v. Wren, 22 Ariz.App. 165, 525 P.2d 296 (1974), where this court held that delay resulting from the defendant's motion for a continuance of an omnibus hearing was attributable to the defendant and should have been excluded under rule 8.4(d), thus extending the last day for trial.

The defendant distinguishes *Stone v. Wren* on the grounds that in that case, the continuance of the omnibus hearing resulted in the delay of the actual last day for trial while in the case at bar, the defendant's extension of time in which to file pretrial motions did not lead to an extended trial date beyond the originally computed "last day."

We find no merit to defendant's argument. Nowhere in rule 8.4 is it stated that the delay, in order to be excluded, must lead to an extended trial date beyond the originally computed last day, although this is often the result. As the court in *Stone v. Wren* stated, "[r]ule 8.4(a) envisions motions that result in the delay of the actual trial date." 22 Ariz.App. at 166, 525 P.2d at 297. This was precisely the result in the case at bar. At defendant's request, the trial court extended the time limit for filing motions from March 19, 1981, to April 20, 1981. Since the trial date was originally set for April 8, 1981, defendant's time extending motion necessitated a continuance of the trial date from April 8, 1981, to May 11, 1981. Thus, pursuant to rule 8.4(a), defendant's motion caused a thirty-two (32) day delay "occasioned by or on behalf of the defendant," which should have been excluded from the computation of the ninety day time limit set forth in rule 8.3(a). *See State v. Gretzler*,[2] 126 Ariz. 60, 612 P.2d 1023

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[2] *State v. Gretzler* presented a fact situation very similar to the case at bar. Gretzler was convicted in California and

(1980). Therefore, the final date on which defendant could have been tried was June 13, 1981.

We hold that the trial court improperly granted defendant's motion to dismiss the charges, and remand the matter for trial. We need not, therefore, address the state's second argument that the trial court abused its discretion in dismissing the charges with prejudice.

The order granting defendant's motion to dismiss the charges is reversed. The case is remanded for trial.

SARAH D. GRANT
Judge

EINO M. JACOBSON
Judge

J. THOMAS BROOK
Judge

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then extradited by Arizona and taken into custody by Arizona authorities on charges of burglary, kidnapping, robbery and murder, and thus, rule 8.3 applied to determine the time period for trial. The court held that various motions made by the defendant, including the motions for continuances of the trial date, "were obtained by [the defendant] as a result of the motions he was entitled in law to make and were 'on behalf of the defendant.' Rule 8.4(a)." 126 Ariz. at 71, 612 P.2d at 1034.

APPENDIX F

IN THE SUPERIOR COURT
OF MARICOPA COUNTY, STATE OF ARIZONA

Jan. 12, 1983

CR 106900

HON. DAVID G. DERICKSON

STATE OF ARIZONA

vs.

JAMES ROBERT BURRUS

This matter having been under advisement,

IT IS NOW ORDERED denying defendant's motion to quash Writ of Habeas Corpus Ad Prosequendum.

FURTHER ORDERED denying alternative motion to dismiss charges against defendant for the reason that the defendant invited his return to federal custody by filing the motion to dismiss which has been determined by the appellate court to be erroneously granted.

FURTHER ORDERED dissolving the stay of the execution of the Writ previously issued.

/s/ David G. Derickson
Judge of the Superior Court

Attorney General

By: Lisa Tewksbury
David Brauer

APPENDIX G

IN THE SUPERIOR COURT
OF MARICOPA COUNTY, STATE OF ARIZONA

Jan. 31, 1983

CR 106900

HON. CECIL B. PETTERSON, JR.

THE STATE OF ARIZONA

vs.

JAMES ROBERT BURRUS

The defendant's Motion to Dismiss having come on for evidentiary hearing and Oral Argument,

The Court having reviewed and evaluated the evidence and law presented and arguments of respective counsel,

IT IS ORDERED denying the defendant's Motion to Dismiss.

The State's Request for Excluded Time and Competition of a last day having come on for Oral Argument,

The Court having reviewed the issues presented,

IT IS ORDERED denying this matter without prejudice.

The Court notes that a collateral matter is presently before the Arizona Supreme Court and only after a decision by that tribunal will this Court then be in a position to rule on the State's requests.

The Court does, however, determine that at the time of dismissal by Judge Myers, May 22, 1981, there were 20 days left before the defendant's last day for trial.

Attorney General
By: Lisa Tewksbury

Public Defender
By: David Brauer

APPENDIX H

SUPREME COURT
STATE OF ARIZONA
201-West Wing
Capitol Building
(602) 255-4536
Phoenix 85007

Supreme Court No. 16401-SA

Maricopa County No. CR-106900

February 17, 1983

JAMES ROBERT BURRUS, PETITIONER

vs.

THE HONORABLE DAVID G. DERICKSON, Judge of the Superior Court in and for the County of Maricopa, RESPONDENT

and

ROBERT CORBIN, Attorney General of the State of Arizona, REAL PARTY IN INTEREST

The following action was taken by the Supreme Court of the State of Arizona on February 16, 1983 in regard to the above-entitled cause:

"ORDERED: The Court declines to accept jurisdiction of the Petition for Special Action."

S. ALAN COOK
Clerk

By /s/ Amatosha Manuel
Deputy Clerk

APPENDIX I

IN THE SUPERIOR COURT
OF MARICOPA COUNTY, STATE OF ARIZONA

March 24, 1983

HON. CECIL B. PETTERSON, JR.

CR 106990

THE STATE OF ARIZONA

vs.

JAMES ROBERT BURRUS

The defendant's Request for Reconsideration of Motion to Dismiss Under Article III, Agreements On Detainers having come on for Evidentiary Hearing and Oral Argument,

The Court having heard and considered the evidence, reviewed the pleadings and law presented and considered the arguments of respective counsel,

The Court determines that:

The defendant was transferred from federal custody to Arizona to stand trial on this matter pursuant to Article III of Agreement on Detainers.

The State by its correspondance and through its efforts acknowledged that an Article III transfer occurred here.

The sending authority attempted unsuccessfully to label this transfer an Article IV transfer.

The time within which the defendant was to have been tried under Article III limitations has expired.

This matter is well beyond the last day for trial.

IT IS ORDERED dismissing this cause with prejudice.

FURTHER ORDERED vacating the date presently set for trial herein, March 28, 1983.

By: Lisa Tewksbury

David Brauer, PD

MCSO

APO

APPENDIX J

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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1 CA-CR 7051 and 1 CA-CR 7139
(consolidated) Department B

Maricopa County Superior Court No. CR-106900

STATE OF ARIZONA, APPELLANT/CROSS-APPELLEE

v.

JAMES ROBERT BURRUS, APPELLEE/CROSS-APPELLANT

[Filed Jan. 9, 1985]

ORDER

The above-entitled matter was considered by Department B of this Court and taken under advisement on November 13, 1984. In light of the Ninth Circuit Court of Appeals decision in *Burrus v. Turnbo*, Slip Opinion 83-1951 (September 25, 1984) and *Cuyler v. Adams*, 449 U.S. 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981), we ordered the appellant to file a supplemental memorandum addressing whether the matter at

issue is now moot. The appellee was ordered to file a responsive memorandum but has failed to do so.

The appellant has advised this Court by memorandum that the issue would be moot if *Burrus v. Turnbo* becomes final. However, the Department of Justice has petitioned the Ninth Circuit for a rehearing of its decision and contemplates filing a writ of certiorari to the United States Supreme Court. As a result, until the decision in *Burrus v. Turnbo* is final, this appeal is not moot. We agree.

IT IS THEREFORE ORDERED that the above-entitled matter be continued under advisement until March 11, 1985.

IT IS FURTHER ORDERED that the appellant, State of Arizona, advise this Court on or before March 11, 1985 as to the finality in *Burrus v. Turnbo*.

DATED this 9th day of January, 1985.

/s/ Eino M. Jacobson
Chief Judge

APPENDIX K

STATUTORY PROVISIONS INVOLVED

1. Article III of the Interstate Agreement on Detainers Act, 18 U.S.C. App. 2, at 545, provides in relevant part:

> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. * * *
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> * * * * * *
>
> (d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's re-

quest for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

* * * * *

2. Article IV of the Interstate Agreement on Detainers Act, 18 U.S.C. App. 2, at 546, provides in relevant part:

(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

* * * * *

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right

which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

3. Article V of the Interstate Agreement on Detainers Act, 18 U.S.C. App. 2, at 546-547, provides in relevant part:

(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

* * * * *

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

* * * * *

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461931 10312

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
JUL 5 1985
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-1736

MIGUEL HIJAR, SUPERINTENDENT,

PETITIONER,

V.

JAMES ROBERT BURRUS,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Respondent, JAMES BURRUS, pursuant to Rule 46 and 18 U.S.C. §3006A(d)(6), asks leave to file the attached Memorandum in Opposition to Government's Petition for Writ of Certiorari without pre-payment of costs, and to proceed in forma pauperis. Respondent was represented by appointed counsel in the District Court and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: 5 July 1985

Respectfully submitted,

JAMES F. HEWITT
Federal Public Defender
450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-7712

Counsel for Respondent BURRUS

No. 84-1736

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

MIGUEL HIJAR, SUPERINTENDENT,

v.

JAMES ROBERT BURRUS

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

JAMES F. HEWITT
Federal Public Defender
450 Golden Gate Ave.
San Francisco,CA 94102
(415) 556-7712
Counsel for Respondent

MEMORANDUM IN OPPOSITION TO GOVERNMENT'S

PETITION FOR WRIT OF CERTIORARI

Facts. The facts and procedural posture of the case are accurately set out in the opinion of the court below. Petition, Appendix A, p. 1a. Most of the citations to the Excerpt of Record in the petition refer to facts stated in memoranda, letters, etc., many of which are patently conclusory in nature and do not reflect the source of the belief.[1] Since most references are not germane to this petition, it is not felt necessary to dispute their accuracy. Those facts necessary to resolution of the issue presented by this petition are set forth in the opinion below.

Discussion. Some of the confusion surrounding the government's petition stems from the mischaracterization of the question presented as whether a [federal] court has power to "enjoin [the] warden... on the ground that the indictment allegedly is invalid because of prior violations of the IAD by the requesting state...."

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1 For example, the government states as a fact that the delay in producing Burrus in Arizona was attributable to his refusal "to sign the forms necessary to effectuate his transfer." Petition, p.8. Petitioner cites two sources for this "fact": an affidavit of the prosecutor attached to a response to Burrus' motion to dismiss the indictment, and a letter from another state prosecutor relating what he had been told by Burrus' prison counselor (E.R. 150, 164). Also contained within the record was Burrus' explanation of why he had refused to sign the forms, and his difficulty with obtaining information on procedures from prison officials. While the record does not reflect that this factual dispute was ever resolved, the Arizona court granted Burrus' motion and dismissed the indictment with prejudice. Petition, Appendix I, p. 37a.

It would be unfortunate were this Court to grant a petition for writ of certiorari upon unproven statements of counsel taken from unverified pleadings. Since Burrus has prevailed in the Arizona trial court, there should be a presumption that the facts were decided in his favor, if any such facts are relevant to this petition.

The District Court did not hold the Arizona indictment invalid, notwithstanding the government's assertion that it did. It held no more than that it would violate federal law for the federal warden to surrender a federal prisoner to a state for the second time, when the state had violated the clear language of the Interstate Agreement. It seems to be the government's position that only the State of Arizona may determine, after the prisoner's retransfer in violation of the agreement, whether or not it had in fact violated the agreement in the first instance.[2] This is indeed suggesting that only the fox has jurisdiction to guard the chicken-coop.

This Court has held that the Interstate Agreement on Detainers is a federal law subject to federal construction. Cuyler v. Adams, 449 U.S. 433 (1981). It seems axiomatic that a federal court has jurisdiction to determine whether a federal prisoner's rights would be violated were he surrendered to a requesting state in violation of the Detainer Agreement. In Cuyler, supra, the Court acknowledged the import of Article IV (d), protecting "any right [the prisoner] may have" other than the lack of the governor's approval. This Court stated:

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2 The Arizona trial court held that article III was indeed violated by the failure of Arizona to try the respondent within the time limits of the agreement, and that since the "matter [was] well beyond the last day for trial," the indictment should be dismissed. Petition, Appendix I, p. 37a. That decision is now on appeal before the Arizona Court of Appeals.

The Arizona Court of Appeals, Division One, observed that this case would be moot if the decision of the Court of Appeals were final. In view of the then pendency of a petition for rehearing and contemplated petition for writ of certiorari to this Court, the Arizona appellate court continued the matter under advisement "until the decision in Burrus v. Turnbo is final." Petition, p. 40a.

Since no stay of mandate was requested by the United States or granted by the Court of Appeals, the decision became final on January 23, 1985, the date on which the mandate in the case below was filed in the District Court. At the present time, there is apparently no charge pending in Arizona, nor is there any detainer placed against the respondent.

> The remedial purpose of the Agreement supports an interpretation that gives prisoners the right to a judicial hearing in which they can bring a limited challenge to the receiving state's custody request. In light of the purpose of the Detainer Agreement, as reflected in the structure of the Agreement, its language, and its legislative history, we conclude as a matter of federal law that prisoners transferred pursuant to the provisions of the agreement are not required to forfeit any pre-existing rights they may have under state or federal law to challenge their transfer to the receiving State.
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> 449 U.S. at p.449.

States that are signatories to the compact are put on notice of the mandatory language of the agreement that if trial is not had prior to the return of the prisoner to the original place of imprisonment, "such indictment....shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." [IAD, Article III (d)]

Implicit in the above article is the recognition that the prisoner has been returned prior to trial. To adopt the government's suggestion that the prisoner must be "shuttled" back to the requesting state upon a second request so that the offending state may determine whether it has violated the agreement flies in the face of logic and the rationale of this Court's holding in Cuyler, supra.

It is significant that the Interstate Agreement recognized this problem when it provided in Article V (c) that failure to bring a prisoner to trial within the required time framework shall result in a dismissal with prejudice by the appropriate court of the jurisdiction where the indictment ... has been pending ..." [Emphasis added]. This language recognizes that the prisoner is then before the court in which his speedy trial rights were violated. Conversely, where there is a return to the place of original imprisonment, the prisoner is back in the sending jurisdiction, and the Interstate Agreement does not

contain any limiting language specifying which court shall act. In any event, Article III states unequivocally that the "indictment ...shall not be of any further force or effect..." and it follows, a fortiori, that any detainer based thereon is unenforceable under the spirit of the agreement.

The District Court simply held that, under the clear terms of the agreement, the detainer was of no further force and effect and that it would violate the agreement to permit Burrus's transfer to Arizona for trial.

States are not powerless to comply with the terms of the agreement. Two obvious alternatives were available: (1) obtain a written waiver by the prisoner to be returned to his original place of confinement pending the appeal, or (2) expedite the appeal. No effort was made to do either. It is implicit in the agreement that the sanctions are harsh. Otherwise, unnecessary delays will become the rule rather than the exception. See for example, the perceptive discussion by the late James V. Bennett in "The Last Full Ounce", 23 Fed. Prob. 20 (June 1959).

One final clarification of an assertion in the government's brief: Burrus was not returned to his original place of confinement "in accordance with [his] wishes." Petition, p.4. Burrus requested that he be released to federal custody in Arizona for medical treatment and access to legal materials. He was not released pursuant to that request. In fact, his request for transfer was ignored, and he was only returned to the place of confinement after the charges were dismissed by the Arizona court.[3] Of course, any transfer of custody to the United States Marshal awaiting trial in Arizona is not a "return of the prisoner to the original place of imprisonment." Federal prisoners may appear in state courts pursuant to the agreement in

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[3] The dismissal on Arizona speedy trial grounds which resulted in respondent's return to his original place of imprisonment was reversed on appeal.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

NO. 84-1736

MIGUEL HIJAR, SUPERINTENDENT,

PETITIONER,

V.

JAMES ROBERT BURRUS,

RESPONDENT.

AFFIDAVIT OF MAILING

James F. Hewitt, a member of the bar of this Court, certifies that pursuant to Rule 28 of this Court, he filed and served the within Memorandum in Opposition to Government's Petition for Writ of Certiorari with the Clerk of this Court and on counsel for petitioner, respectively, by depositing said memorandum, and copies thereof, in the United States Mails at San Francisco, California, on July 5, 1985, first class, postage pre-paid within the time allowed for filing.

Service was made upon counsel for petitioner at the following address:

Honorable Rex Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

JAMES F. HEWITT
Federal Public Defender

Counsel for Respondent BURRUS

Subscribed and sworn to before me
on this 3 day of July, 1985

Deputy Clerk, United States District Court

federal custody.[4] Congress recognized this possibility, when it was observed in the Senate Report on the bill (Sen. Rep.91-1356):

> In the case of a federal prisoner, the prosecution will be entitled to temporary custody as provided by the agreement or to the prisoner's presence in Federal custody at the place of the trial, whichever arrangement may be approved by the custodian.

1970 U.S. Code Congress & Administrative News, p.4865

Contrary to the government's suggestion, this is not a case of significant recurrence justifying this Court's intervention to clarify an important question of statutory interpretation. Nor is there a conflict in the circuits on the issue; rather, it is a problem that rarely occurs. This is obviously because most states, realizing the strict requirements of the agreement, are careful to meet its provisions.

It must be remembered that the issue below was a narrow one. As stated by the Court of Appeals:

> The case before us is not an appeal from a judgment on the merits of the charges that Arizona has preferred against Burrus. Instead, it is an appeal from the district court's determination that the United States will participate in a violation of article III if the Warden transfers Burrus back to Arizona.

Opinion, Petition, p. 16a.

A federal district court has interpreted federal law as it affects a federal prisoner. The judgment was affirmed by the Court of Appeals limited to that issue. The government seeks to

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[4] Article V(a), IAD.

make the case a broad attack upon the rights of states under the Interstate Agreement. It should not be permitted to use this narrow decision for that purpose. The petition for writ of certiorari should be denied.

Respectfully Submitted,

JAMES T. HEWITT
Federal Public Defender

Counsel for Respondent

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 84-1736

In the Supreme Court of the United States

OCTOBER TERM, 1985

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1736

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We have demonstrated in the petition for a writ of certiorari that the court of appeals plainly erred in holding: (1) that the federal district court could entertain this suit for injunctive relief to prevent the federal warden from complying with Arizona's request for custody of respondent pursuant to the Interstate Agreement on Detainers (IAD) (see Pet. 10-19); and (2) that, on the merits, Arizona now is barred by the "anti-shuttling" provision of the IAD from trying respondent because the Superior Court ordered him returned to federal custody after it granted his motion to dismiss the indictment on state law speedy trial grounds (see Pet. 22-26). As we have further explained (Pet. 19-21, 22-23, 26-29), each of these holdings by the court of appeals conflicts with the decisions of other courts of appeals and state courts and threatens substantially to disrupt the cooperative administration of the IAD. Review by this Court therefore is plainly warranted.

Respondent makes essentially no effort to rebut our submission on these issues. The several points respondent asserts by way of confession and avoidance are not meritorious.

1. a. In attempting to defend the court of appeals' affirmance of the permanent injunction barring the federal warden from complying with Arizona's request for custody, respondent asserts (Mem. in Opp. 2) that the district court did not actually hold the Arizona indictment invalid under the IAD. In making this assertion, respondent apparently seeks to minimize the extent to which the holding of the courts below interferes with the criminal proceedings against respondent in Arizona. Respondent is wrong.

The district court quoted the anti-shuttling provision, Article III(d), which states that if trial is not had on an indictment prior to return of the prisoner to his original place of custody, the indictment " 'shall not be of any further force or effect' " (Pet. App. 23a). The court then held that respondent was entitled to the benefits of the IAD, and it accordingly ordered the warden not to transfer respondent for trial on the indictment or to give effect to the detainer based on that indictment (Pet. App. 23a-24a). The court of appeals quoted the same language in Article III(d) and concluded that Arizona had "forfeited its sole opportunity to prosecute [respondent]," and on this basis it affirmed the permanent injunction entered by the district court (Pet. App. 18a-20a). Thus, the opinions by the courts below clearly hold that the Arizona indictment is invalid under the IAD, and indeed a holding to that effect was a necessary predicate to the relief they granted. Compare *California* v. *Grace Brethren Church*, 457 U.S. 393, 405-407 (1982); *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980).

In any event, however the court of appeals' holding may be characterized, that court unquestionably has countenanced a direct interference by the federal courts with the criminal prosecution in Arizona—an interference that even the court of appeals appeared to acknowledge (Pet. App. 13a-14a) is in tension with the principles of federalism, comity, and equitable discretion established by *Younger* v. *Harris*, 401 U.S. 37 (1971), and its progeny. Where, as here, the receiving state's request for custody meets the explicit requirements of the IAD—*i.e.*, where that request was approved and transmitted by the court in the receiving state that has jurisdiction of the indictment, and the 30-day period during which the governor of the sending state (here, the Attorney General of the United States) may interpose an objection has expired—the IAD provides that the receiving state "shall be entitled" to custody of the prisoner. Art. V(a). The prisoner does not thereby lose his right to challenge the validity of the indictment under the IAD. He simply must challenge the indictment in the courts of the receiving state (here, Arizona), as the text and structure of the IAD contemplate. See pages 4-5, *infra*.

Moreover, contrary to respondent's assertions (Mem. in Opp. 2, 3), the courts of the receiving state are not foreclosed from determining this question until after the prisoner has actually been retransferred from federal custody to state custody, allegedly in violation of the IAD. To the contrary, in this very case, respondent filed his motion to quash the writ of habeas corpus ad prosequendum and to dismiss the indictment in the Maricopa County Superior Court while he was still in federal custody, and indeed he continues to litigate the validity of the indictment under the IAD in the Arizona Court of Appeals even while he remains in federal custody. But if the Arizona Court of Appeals ultimately rejects respondent's IAD claims and remands the case for trial, the injunction affirmed by the court of appeals

in this case would remain as an obstacle to that prosecution, which respondent's collateral action in federal court already has unduly delayed.[1]

b. Respondent argues, however, that to require him to litigate his IAD objections to the Arizona prosecution in the Arizona courts would mean that "only the fox has jurisdiction to guard the chicken-coop" (Mem. in Opp. 2). Respondent betrays a wholly unjustified and regrettable lack of respect for the courts of Arizona and the 47 other states that are parties to the IAD. See *Carchman* v. *Nash*, No. 84-776 (July 2, 1985), slip op. 1. Those courts are bound both by the Supremacy Clause and by state law to enforce the IAD, and there is no basis to doubt that they will do so. Nor is there any occasion here to consider further the desirability as an abstract policy matter of vesting the courts of the receiving state with responsibility for determining

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[1]Respondent contends (Mem. in Opp. 2 n.2) that "there is apparently no charge pending [against him] in Arizona" because the Arizona Court of Appeals previously had indicated that the State's appeal to that court from Superior Court's dismissal of the indictment under the IAD would be moot if the Ninth Circuit's decision in this case became final. Respondent contends that because the Ninth Circuit did not stay its mandate and that mandate has issued, the Ninth Circuit's decision now is final.

By order dated July 8, 1985, the Arizona Court of Appeals in fact did dismiss the State's appeal on the ground respondent urges. However, on the State's motion for reconsideration, that court, by order dated August 20, 1985, reinstated the State's appeal and ordered the appeal to be held in abeyance once again (until October 8, 1985), pending the disposition of the petition for a writ of certiorari in this case. In its order reinstating the appeal, the Arizona Court of Appeals correctly recognized that under *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983), the issuance of the court of appeals' mandate does not affect the jurisdiction of this Court to review the court of appeals' judgment or its ability to reverse that judgment and order the permanent injunction vacated. Because the State's appeal challenging the Superior Court's dismissal of the indictment under the IAD is still pending in the Arizona Court of Appeals, this case clearly is not moot.

whether indictments pending before them are invalid under the speedy-trial or anti-shuttling provisions of the IAD. The IAD, which Congress has approved as an interstate compact and to which it has made the United States a party, expressly provides for the courts of the receiving state to adjudicate such questions. By contrast, it confers no such authority on the courts of the sending state (in this case, the federal district courts). See Arts. III(d), IV(e) and V(c); Pet. 14-15.[2] The Ninth Circuit failed to respect that deliberate choice by Congress and the legislatures of the other party states.[3]

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[2]Contrary to respondent's contention (Mem. in Opp. 3-4), there is no distinction between the speedy-trial and anti-shuttling provisions of the IAD with regard to whether the courts of the receiving state or those of the sending state should enforce their terms. The former provides that "the appropriate court of the jurisdiction where the indictment * * * has been pending shall enter an order dismissing the same with prejudice" (Art. V(c)), while the latter provide that the "court shall enter an order dismissing the [indictment] with prejudice" (Arts. III(d) and IV(e)). In both instances, the IAD contemplates a role only for the court of the receiving state before which the indictment is pending.

[3]Respondent's reliance (Mem. in Opp. 2-3) on Article IV(d) of the IAD and *Cuyler* v. *Adams*, 449 U.S. 433 (1981), in support of federal court intervention in a case such as this is without merit. As we have explained in the certiorari petition (at 15-16), this Court held in *Cuyler* v. *Adams* only that Article IV(d) preserves whatever right the prisoner has *outside* the IAD (*e.g.*, under the Uniform Criminal Extradition Act, which has not been adopted by the United States) to a limited judicial "hearing" prior to transfer. Neither *Cuyler* v. *Adams* nor Article IV(d) suggests that the IAD itself confers a right to bring an action in the courts of the sending state (or in federal court) to challenge the validity under the IAD of the indictment that is pending in the receiving state. To the contrary, *Cuyler* v. *Adams* recognizes that the only right the IAD affords the prisoner in the sending state is the right to petition its governor for relief. 449 U.S. at 444-447. This express authorization to seek relief from the executive in the sending state suggests the absence of a right to appeal to the judiciary in the sending state. Pet. 15.

2. Respondent mentions only in passing the court of appeals' ruling on the merits that Arizona is now barred by Article V(c) of the IAD from prosecuting him because the Superior Court ordered him returned to federal custody when it granted his motion to dismiss the indictment on state law speedy trial grounds. See Mem. in Opp. 4. Respondent makes no effort to square this holding with the text of the IAD or with its purpose to minimize the disruption of the prisoner's rehabilitation at his original place of confinement. Nor does respondent advert to his position in the Maricopa County Superior Court that "[i]t would have been the worst violation of Arizona's Agreement on Detainers to have held [him] in the Maricopa County Jail pending outcome of the appeal," because "he would have languished in the Maricopa County Jail for over 19 months" (E.R. 73; see Pet. 23).

Instead, long after respondent was returned to federal custody—without any objection on his part and as the direct consequence of his own motion to dismiss the indictment—respondent now asserts (Mem. in Opp. 4) that the State should have either (i) obtained a written waiver from him before returning him to federal custody, or (ii) expedited the appeal of the dismissal of the indictment. As we have explained in the certiorari petition (at 28), however, the courts of appeals consistently have held that a prisoner may be deemed to have waived the protections of the IAD (including its anti-shuttling provisions) by taking or requesting actions inconsistent with those protections, even in the absence of an express waiver.

As we also have explained in the petition (at 23 n.15), although the IAD imposes time limits on proceedings in the *trial* courts of the receiving state, it imposes no such limits on proceedings in the appellate courts. Nor does it silently impose a vague duty on the receiving state to "expedite" any appeal from the dismissal of an indictment, as respondent

urges. Furthermore, if respondent means to suggest that an appeal must be expedited to the extent necessary to permit the trial to be held within the 180-day or 120-day speedy-trial periods under Article III(a) or IV(c) of the IAD, it often would be impossible for the receiving state to meet those deadlines if they were not extended during the pendency of the appeal, especially if the trial court's dismissal of the indictment occurred toward the end of the relevant period. But as it happens, Article VI(a) in fact provides that the running of the speedy trial periods "shall be tolled whenever and for as long as the prisoner is unable to stand trial"—which necessarily includes the period during which any appeal from the dismissal of the indictment is pending in an appellate court, since a defendant cannot stand trial on charges that have been dismissed. There is no limitation on the duration of such tolling; it is to be "for as long as" the appeal remains pending under applicable appellate procedures, which the IAD did not purport to displace.

3. Finally, respondent baldly asserts (Mem. in Opp. 5) that there is no conflict among the circuits on the issues presented in the petition for a writ of certiorari. Respondent is simply wrong. The Ninth Circuit's holding in this case that respondent could bring an action in federal district court to challenge the validity of the Arizona indictment under the IAD and to prohibit the federal warden from transferring him to Arizona for trial on that indictment conflicts with the decisions of the Third and Tenth Circuits in *Mokone* v. *Fenton*, 710 F.2d 998, 1002-1003 (3d Cir. 1983), and *Campbell* v. *Virginia*, 453 F.2d 1230, 1231 (10th Cir. 1972), and with numerous state court decisions that have held that only the court of the state in which the criminal charges are pending has jurisdiction to entertain a challenge to the validity of those charges under the IAD. See Pet. 20. Similarly, the court of appeals' holding on the merits that Arizona now is prohibited by the IAD's anti-shuttling provision from trying respondent is inconsistent

with the decisions of a number of state and federal appellate courts that have held that a prisoner may be deemed to have waived the protections of the IAD by taking or requesting actions inconsistent with those protections (see Pet. 27-28). These conflicts warrant resolution by this Court.

CONCLUSION

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted. Because respondent has failed to offer any substantial defense of the court of appeals' rulings in this case, we renew our suggestion that the Court consider summary reversal of the judgment below. If the Court follows that course and agrees with our threshold submission that the district court was without authority to entertain this suit for injunctive and declaratory relief against the federal warden, the Court should vacate the judgment of the court of appeals and remand with instructions to dismiss the complaint.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

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(4)

No. 84-1736

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA, PETITIONER

v.

JAMES ROBERT BURRUS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES SUGGESTING MOOTNESS

This case presents the question whether the warden at a federal prison in California where respondent was incarcerated was properly enjoined from honoring a detainer filed by the State of Arizona. Respondent brought this action to prevent the warden from complying with a request by Arizona under the Interstate Agreement on Detainers (IAD), 18 U.S.C. App. 2, for temporary custody of respondent so that the State could try him on fraud charges pending there. On March 7, 1983, the United States District Court for the Northern District of California entered a permanent injunction prohibiting the warden from recognizing or giving effect to the detainer and from transferring respondent to

the custody of Arizona (Pet. App. 22a-24a).[1] On September 25, 1984, the Ninth Circuit affirmed the judgment and the permanent injunction (*id.* at 1a-20a). The government petitioned for a writ of certiorari, which this Court granted on October 7, 1985.

While the instant litigation was proceeding, respondent filed on November 9, 1984, an entirely separate action in the Central District of California, where he was then incarcerated, challenging the calculation of his parole release date with respect to his federal sentences.[2] Subsequent to the time this Court granted review, we learned that respondent had been ordered released from federal custody on September 26, 1985, by a magistrate in the Central District of California in connection with respondent's action in that district. The halfway house in Phoenix, Arizona—where respondent was living—obeyed this order on September 27. Because, as we also learned when we investigated the circumstances giving rise to his release, respondent was in any event scheduled to be paroled on October 5, 1985,[3] the Central District case now concerns

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[1]In doing so, the court apparently concluded that Article III(d) of the IAD barred respondent's trial in Arizona because the State, having previously obtained his custody under the IAD, had failed to try respondent before returning him to the federal penitentiary (see Pet. App. 23a).

[2]Specifically, respondent's suit involved whether "split sentences" (see 18 U.S.C. 3651) should be "aggregated" (see 18 U.S.C. 4161, 4205(a); 28 C.F.R. 2.5) with other consecutive sentences for the purpose of calculating parole eligibility and good time credit.

[3]At the time our petition was filed, in the beginning of May 1985, this case was of course not moot, nor was it clear that it would become moot before the Court decided it—respondent's parole date could have been deferred, or the Court might have rendered a summary decision before recessing for the summer. Had we known of respondent's anticipated parole date prior to this Court's action on the petition, we would of course have advised the Court of that fact. Still, because of our belief that the court of appeals had decided an important issue in an incorrect

only an eight-day period of incarceration. The Bureau of Prisons has concluded that, even were the government to prevail on the merits in the Central District case, respondent's re-imprisonment for the eight unserved days prior to his scheduled parole would be pointless and that respondent, having now been released, will not be reincarcerated. Accordingly, a motion is being filed to dismiss the Central District case as moot.

Thus, respondent is not now imprisoned and will not be re-imprisoned unless he commits a new offense or violates his parole conditions.[4] "Imprisonment" is, however, a prerequisite for Arizona's detainer to have effect under the IAD; if respondent is not incarcerated in a federal prison, federal prison officials have neither the duty nor the right under the IAD to "deliver" him for trial in Arizona.[5] We

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manner that would have substantial adverse repercussions in future litigation, we would have maintained our petition and requested, as we now do, that the Court vacate the decision of the court of appeals.

[4]The possibility that respondent may be reimprisoned by the federal government because of future misconduct is too attenuated to prevent mootness. See *Lane* v. *Williams*, 455 U.S. 624, 633 n.13 (1982); *Murphy* v. *Hunt*, 455 U.S. 478 (1982); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975). See also *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 70-73 (1983); *Vitek* v. *Jones*, 436 U.S. 407 (1978); *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406 (1972); *Golden* v. *Zwickler*, 394 U.S. 103, 108-109 (1969); *Yun Cannon* v. *Breed*, 565 F.2d 1096, 1101 (9th Cir. 1977); *Allen* v. *Likins*, 517 F.2d 532, 534-535 (8th Cir. 1975); but cf. *Micklus* v. *Carlson*, 632 F.2d 227, 232-233 (3d Cir. 1980).

[5]Arizona's detainer was lodged explicitly under the IAD. It is clear that the IAD has no application to an individual who has been paroled. Articles III(a) and IV(a) of the IAD, 18 U.S.C. App. 2, at 545-546, have as a predicate that the detainer be lodged against a "prisoner" who is serving a "term of imprisonment" in a penal or correctional institution. The IAD speaks throughout of the "prisoner," his "term of imprisonment," the "State in which the prisoner is incarcerated," the "place of his imprisonment," and "the warden, commissioner of corrections, or other official having custody of [him]." Further, Articles III(a) and IV(b)

understand, moreover, that respondent is residing *in Arizona,* and there is nothing in the injunction that is the subject of the instant case to prevent the State—which is not a party to this action—from detaining him.[6] Consequently, whether the injunction at issue here stands or falls has no impact upon the parties; this case accordingly presents only a " 'question[] that cannot affect the rights of litigants in the case before' " the Court. *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974), quoting *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971). And, since this case does not involve a class suit, a challenged action of necessarily short duration, or a reasonable expectation that the controversy will arise for

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provide for certification "stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision[s] of the State parole agency relating to the prisoner"; Article V(f) states that after the prisoner has been turned over to the receiving state, "time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow." See *United States* v. *Reed,* 620 F.2d 709 (9th Cir.), cert. denied, 449 U.S. 880 (1980); *United States* v. *Dobson,* 585 F.2d 55 (3d Cir.), cert. denied, 439 U.S. 899 (1978); *State ex rel. Otterstetter* v. *McManus,* 309 Minn. 68, 69-73, 243 N.W. 2d 730, 731-733 (1976); Annot., 98 A.L.R. 3d 160, 185-187 (1980 & Supp. 1985) ("Validity, Construction, and Application of Interstate Agreement on Detainers").

[6]We are advised that the Arizona Court of Appeals has taken the position that it will not consider the State's appeal seeking reinstatement of the prosecution against respondent—dismissed by the trial court (see Pet. App. 37a-38a)—until the instant case is resolved, and the Arizona prosecutors have decided that they will not detain respondent until the court of appeals acts. This delay in the state criminal case proceedings is apparently due to the possibility that this Court would reach and decide the merits of the IAD issue in the instant case, thereby settling the merits of the Arizona appeal as well. The fact that nonparties choose to await its outcome, however, cannot keep an otherwise moot case alive. In any event, if the decision below is vacated by this Court as moot, that action itself would presumably revive the proceedings in the Arizona courts.

these parties again, it is not within the "capable of repetition yet evading review" doctrine. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Accordingly, the case is moot. See *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920).

The judgment of the court of appeals should therefore be vacated and the case remanded with directions to vacate the injunction entered by the district court. See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

Respectfully submitted.

CHARLES FRIED
Solicitor General

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NO. 84-1736

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MIGUEL HIJAR, SUPERINTENDENT, FEDERAL PRISON CAMP AT BORON, CALIFORNIA,
Petitioner,

-vs-

JAMES ROBERT BURRUS,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF ARIZONA IN SUPPORT OF PETITIONER, AMICUS CURIAE

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)255-4686

14 pp

Questions Presented

1. Whether a federal prisoner may bring an action in federal district court to enjoin his warden from complying with a request by a state prosecutor for temporary custody of the prisoner pursuant to the Interstate Agreement on Detainers (IAD) on the ground that the indictment allegedly is invalid because of prior violations of the IAD by the requesting state, or whether the prisoner instead must challenge the validity of the indictment in the court of the requesting state that has jurisdiction of the indictment.

2. Whether under the "anti-shuttling" provisions of the IAD, a state that has received custody of a prisoner pursuant to the IAD must retain him in its custody while it appeals the granting of the prisoner's motion to dismiss the charges against him or suffer a forfeiture of the right to prosecute him.

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INTEREST OF AMICUS CURIAE

The State of Arizona, through its Attorney General, respectfully offers this brief as amicus curiae in support of the petitioner. The amicus curiae has attempted to obtain temporary custody of the respondent, James Robert Burrus, pursuant to the Interstate Agreement on Detainers in order to try him on certain state criminal charges. However, the United States District Court has issued a permanent injunction forbidding the petitioner from releasing the respondent from federal custody to the temporary custody of the State of Arizona. Therefore, the amicus curiae has a profound interest in the resolution of the issues before the Court.[1]

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1. The amicus curiae has obtained the consent of both parties to file this brief. A written consent from respondent will be provided as soon as amicus curiae receives it from respondent's counsel, who has given his verbal consent.

ARGUMENT

On May 15, 1979, the State of Arizona obtained an indictment charging James Robert Burrus with one count of fraudulent schemes and five counts of forgery. Mr. Burrus was a fugitive from justice at the time, but he was subsequently arrested in Idaho on a federal charge.

Upon learning that Mr. Burrus was in federal custody, the State of Arizona on July 3, 1980, began efforts to obtain temporary custody of Mr. Burrus pursuant to the Interstate Agreement on Detainers (IAD). After much delay occasioned by Mr. Burrus, federal correctional officials released Mr. Burrus on February 11, 1981, to the temporary custody of the State of Arizona. The state arraigned Mr. Burrus on the pending charges and, after several postponements, trial was set for May 21, 1981.

On that date Mr. Burrus moved to dismiss the indictment with prejudice, arguing that the state's speedy trial time limits[2] had passed. Over the state's opposition, the trial court granted Mr. Burrus' motion and dismissed the indictment with prejudice. The trial court also ordered that Mr. Burrus be returned to federal custody.

The State of Arizona appealed the trial court's dismissal of the indictment. On October 7, 1982, the Arizona Court of Appeals reversed and remanded the matter for trial. See State v. Burrus, 134 Ariz. 251, 655 P.2d 371 (Ct.App. 1982). Burrus was unsuccessful in his effort to get the Arizona Supreme Court to review the lower court's decision, and on December 22, 1982, the Arizona Court of Appeals issued its mandate.

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2. See Rule 8.3(a), Arizona Rules of Criminal Procedure.

The State of Arizona immediately initiated efforts to reobtain temporary custody of Mr. Burrus. Mr. Burrus opposed these efforts and filed a motion to dismiss the indictment arguing under Articles III(d) and IV(e) of the IAD that his return to federal custody before trial required the trial court to dismiss the indictment with prejudice. The trial court denied this motion on January 12, 1983. Mr. Burrus then filed another motion to dismiss, arguing that he had not been brought to trial within the 180-day time limit of Article III of the IAD. The trial court denied this motion on January 31, 1983.

In the meantime, on January 18, 1983, Mr. Burrus filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California under 28 U.S.C. § 2241. The State of Arizona was not a party to

this action. Mr. Burrus sought an order enjoining the federal correctional authorities from releasing him to the temporary custody of the State of Arizona. On March 7, 1983, the district court granted the requested injunction.

On March 24, 1983, the state trial court granted Mr. Burrus' request to reconsider its order of January 31, 1983, and dismissed the indictment with prejudice under the IAD's 180-day speedy trial provision. The State of Arizona appealed that order. Mr. Burrus cross-appealed from the trial court's denial of his motion to dismiss under the anti-shuttling provision of the IAD.

On September 25, 1984, the Ninth Circuit affirmed the judgment and permanent injunction entered by the District Court. Burrus v. Turnbo, 743 F.2d 693 (9th Cir. 1984). The court of appeals subsequently denied a petition

for rehearing and rejected a suggestion for rehearing en banc.

In its efforts to prosecute Mr. Burrus, the State of Arizona has at all times attempted to comply with the provisions and the spirit of the IAD. When Mr. Burrus first succeeded in inducing the trial court to dismiss the indictment against him, the State of Arizona returned Mr. Burrus to federal custody while the state pursued its right of appeal. When the State of Arizona established that the dismissal had been erroneous, it attempted to reobtain custody of Mr. Burrus. However, it found its efforts blocked by Mr. Burrus, who went to federal district court for relief in a proceeding to which the state was not a party. Once the federal district court granted Mr. Burrus' requested injunction, the state trial court dismissed the indictment based on an

alleged violation of the IAD's 180-day time limits. Once again, the state sought relief through its right of appeal. However, the Arizona Court of Appeals is staying any resolution of that appeal until the Ninth Circuit's affirmance of the injunction becomes final or this Court overturns that decision.

The State of Arizona supports the position advanced by the petitioner in this matter. The federal district court and the court of appeals should not have interfered in Arizona's efforts to prosecute Mr. Burrus. And, once the federal courts did intervene, they erred in ruling that the anti-shuttling

provisions of the IAD preclude Arizona from trying Mr. Burrus.[3] The State of Arizona remains ready to try Mr. Burrus, and asks this Court to grant the petition for writ of certiorari.

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3. The State of Arizona maintains its position that Mr. Burrus was transferred to state custody pursuant to Article IV rather than Article III of the IAD. However, resolution of that point is not essential to the resolution of the petition before this Court.

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, a member of the Bar of this Court, being first duly sworn upon oath, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon JAMES HEWITT, Federal Public Defender, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, 94102, and REX E. LEE, Solicitor General, STEPHEN S. TROTT, Assistant Attorney General, ANDREW L. FREY, Deputy Solicitor General, EDWIN S. KNEEDLER, Assistant to the Solicitor General, PATTY MERKAMP STEMLER, Attorney, Department of Justice, Washington, D.C. 20530, by depositing the same in the United States Mail, with first class postage prepaid, return receipt requested.

Gerald R. Grant

GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 4th day of June, 1985.

Susan C. Lewis

SUSAN C. LEWIS
NOTARY PUBLIC

My Commission Expires:

October 17, 1988

CR30-034/6551D/scl